Supreme Court, U.S.
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No. _____
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In The

Supreme Court of the United States

WILLIAM L. FRY
Petitioner

v.

MEL MARTINEZ, Secretary
of the Department of Housing and Urban Development,
THE FIRST INVESTMENT COMPANY
OF COLUMBUS OHIO,
an Ohio Corporation, and
ALLIANCE MORTGAGE COMPANY
OF JACKSONVILLE, FLORIDA,
a Florida Corporation

On Petition For Writ Of Certiorari To The United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Is the complaint, as to HUD, bound by 28 U.S.C. 2401(a) as a suit against the United States under the Administrative Procedures Act (APA) or 2401(b) as a suit against an agency under the Federal Torts Claims Act (FTCA), or partially under both, and, does either limitations period set forth in (a) or (b) bar the petitioner's action against HUD?

Petitioner's position is that the suit is against HUD as an agency, partially functioning in the common marketplace in the context of an insurance company and lender, and, as such, does not have the protection of the limitation period under (a) or (b). AND/OR, the limitations period has been equitably tolled or has not yet begun to run under either (a) or (b) due to the actions and possible fraud and estoppel of HUD, and multiple unanswered complaints filed with HUD from 1991 through 2000, bridging APA and FTCA with incidents documented from 1983 through 2000 with case law supporting the Petitioner's theory of continuing wrong and possible fraudulent concealment as to all of the Defendants.

As to 2401(a), the Petitioner has raised the issue of a split among the various circuits as the District of Columbia Circuit (1996) has ruled on a parallel matter as a suit "not against the United States" wherein HUD, for its own benefit, has taken the opposite stance from that it has taken in this matter within the Third Circuit. The Supreme Court should address this split among the circuits and rule on this question to resolve this split of authority.

As to 2401(b), there is new case law from the Eighth Circuit (filed on July 5, 2001) which closely parallels many of the matters in the instant case being appealed as well as the Petitioner's First Amended Complaint and the proposed Second Amended

Complaint based upon the complaints filed with and not addressed by HUD, said amendments were rejected by the lower Courts.

The new case law gives specific weight to many items of this matter as being under the FTCA and the applicability of the specific claims in both amended complaints as to HUD being negligent in failing to perform "mandatory procedures" and the specific claims for "breach of contract".

This new case law creates the issue of a second split among the various circuits which the Supreme Court should address and rule on to resolve the split of authority.

II. Were the due process rights of petitioner as guaranteed under the 14th Amendment of the U.S. Constitution violated by the absence of or abandonment by his private counsel at an appellate oral argument and non-participation in following proceedings, which said absence and non-participation was due to cardiac arrest and heart transplant of private counsel?

III. Was the issue of *res judicata* properly decided by the Third Circuit under the Full Faith and Credit statute, 28 U.S.C. 1738, when the opinion of the Third Circuit incorrectly applied the four necessary indicia required by law to meet the test of *res judicata* as to each of the Defendants?

IV. Did the Third Circuit improperly adopt an erroneous set of facts which conflicts with the record, give improper standing to Defendant Alliance Mortgage as being successor in interest to Defendant First Investment and improperly predicate its opinion as to all Defendants on the said erroneous facts and standing?

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Petitioner respectfully asks the Court to issue a writ of certiorari for the reasons set forth herein.

OPINIONS BELOW

The Opinion of the court of appeals is not reported (Pet. App. 1-15). The Order denying rehearing

and rejecting a suggestion of *in banc* review is not reported (Pet. App. 16-17). The Opinion of the District Court is not reported (Pet. App. 18-28).

JURISDICTION

The Third Circuit Court of Appeals issued its Judgment and Opinion on September 14, 2000. By Order of June 29, 2001, the Court denied a petition for rehearing and rejected a suggestion of *in banc* review. The Supreme Court has jurisdiction under 28 U.S.C. 1254(1) as well as an interpretation of the due process clause of the 14th Amendment of the United States Constitution.

RELEVANT STATUTES AND REGULATIONS

1. **28 U.S.C. § 2401. Time for commencing action against United States** which states:

> "(a) Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within the six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.
> (b) a [A] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of

notice of final denial of the claim by the agency to which it was presented."

Petitioner contends that the suit as to HUD is against HUD as an agency, not suit against the United States under 2401(a), as HUD, in the context of the suit, is partially functioning in the common marketplace having assumed the roles of insurance company and lender, and, as such, does not have the protection of the limitation period under (a) or (b). AND/OR the limitations period has been equitably tolled or has not yet begun to run under either (a) or (b) due to the actions and possible fraud and estoppel of HUD, and multiple unanswered complaints filed with HUD from 1991 through 2000, bridging APA and FTCA with incidents documented from 1983 through 2000 with case law supporting the Petitioner's theory of continuing wrong and possible fraudulent concealment as to all Defendants.

As to 2401(a), the Petitioner has raised the issue of a split among the various circuits as the District of Columbia Circuit (1996) has ruled on a parallel matter as a suit "not against the United States" wherein HUD, for its own benefit, has taken the opposite stance from that it has taken in this matter within the Third Circuit.

As to 2401(b), there is new case law from the Eighth Circuit (filed on July 5, 2001) which closely parallels many of the matters in the instant case being appealed as well as the Petitioner's First Amended Complaint and the proposed Second Amended Complaint based upon the complaints filed with and not addressed by HUD, said amendments were rejected by the lower Courts.

2. **14th Amendment of the United States Constitution** which states in relevant part:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Petitioner contends that his due process rights as guaranteed under the 14th Amendment of the U.S. Constitution were violated by the absence of, or, abandonment by his private counsel at an appellate oral argument before the Superior Court of Pennsylvania and non-participation in following proceedings, which absence and non-participation was due to cardiac arrest and heart transplant of private counsel.

The state court system continued as if the incapacitated non-participating counsel was a fully functional part of the legal and adversarial system of justice, but, in actuality, the Petitioner was totally unrepresented for argument and through judgment, and following, resulting in judgment to deprive him of his property, namely his home, without representation and with the loss of his right to file a timely appeal.

The Petitioner contends that as a further result of the absence of, or, abandonment by his private counsel at appellate level, he suffered the loss of his Due Process Rights by being unrepresented and unable to participate in our adversarial system of justice thus his case before the state courts was not heard on the merits and therefore can not be given "full faith and credit" in the Federal Courts as *Res Judicata*.

The Pennsylvania Superior and Supreme Courts denied *Per Curiam* the *Pro Se* petitions *Non Pro Tunc* for allowance of reargument.

STATEMENT OF THE CASE

A. BACKGROUND:

The Petitioner, William L. Fry, is filing this **PETITION FOR A WRIT OF CERTIORARI** seeking the Supreme Court's review of the proceedings in both the state court system as well as the same in the Federal District Court and the U.S. Court of Appeals for the Third Circuit.

This matter specifically involves the possibility of improper servicing of a mortgage including possible incomplete, inaccurate, improper and possibly fraudulent filings with HUD by Defendant First Investment specifically in 1991 in relation to an assignment request to HUD, prior to 1991 concerning the servicing of the mortgage and all filings with HUD since 1991 as well as possible fraudulent concealment of improper acts.

This Statement of the Case is presented in specific detail as the Court of Appeals in their **OPINION** (Pet. App. 3-15) is factually and historically incorrect which Petitioner rebutted in the section "CORRECTION OF ERROR - INCORRECT HISTORY AND FACTS" in his **PETITION OF PLAINTIFF-APPELLANT FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC** (Pet. App. 55-76, at 63).

These matters are documented in the Record contained in the 652 page, 2 volume Appendix submitted to the Court of Appeals (referenced herein as CA.Ap.I and CA.Ap.II), which included over one hundred pages of correspondence between Petitioner Fry, Congressman Phil English, Senator Arlen Specter, HUD, Defendant First Investment Company and

Defendant Alliance Mortgage,

These acts have been perpetuated by Alliance Mortgage since assuming the servicing of the mortgage in 1997 by the failure to address or to correct the improper acts and by filings in the District Court and the Bankruptcy Court which were based upon the improper acts and filings of First Investment.

The matter before the District Court, the Appellate Court and now the Supreme Court, is based upon the harm to the Petitioner and his family by First Investment as has been documented in 37 incidents between 1983 and 1991. Additional harm caused by First Investment occurred in multiple documented incidents in 1991, 1992, 1993 and 1994. The harm caused by First Investment has continued through today and is continuing into tomorrow.

A "FORMAL COMPLAINT" containing 74 items of complaint from 1983 through 1994 was presented to HUD by the joint efforts of Congressman Phil English and Senator Arlen Specter in September of 1998. Portions of same were included as Exhibits to Petitioner's filings within the District Court. These were previously ignored by HUD and which were recently refused review by HUD (Exhibit 5 at CA.Ap.I 383-385 of Petitioner's **MOTION FOR LEAVE OF COURT TO FILE A FIRST AMENDED COMPLAINT**, CA.Ap.I 368-391).

B. HISTORY OF THE CASE:

On August 25, 1982, the petitioner entered into a mortgage agreement with First Investment Company of Columbus, Ohio for the purchase of William L. Fry's residence. The loan was insured under the Section 235 of the National Housing Act, which at that time subsidized mortgage payments for income-eligible parties, which Congress instituted to stimulate the building industry and to assist homeowners with

acquiring affordable housing. The subsidy was to offset the high mortgage interest rate (15% and higher) at that time.

The subsidy is based upon the family income as related to specific guidelines with required annual recertifications. The subsidy recertification and calculation is managed by the mortgage company as part of the mortgage servicing and the mortgage company is responsible to HUD for the proper calculation of the subsidy and the proper servicing of the mortgage as defined in the HUD Regulations and the Code of Federal Regulations. The program was administered under HUD supervision with servicing requirements as defined under 24 CFR § 203 and 24 CFR § 235.

On May 1, 1991, due to circumstances beyond his control, William L. Fry defaulted on his mortgage loan. Under a special HUD program in existence at that time, HUD-insured mortgagors could request to have HUD accept assignment of the mortgage to avoid the initiation of foreclosure proceeding by the mortgagee. This assignment program was available if the mortgagor was in default for reasons beyond the mortgagor's control. 12 U.S.C. 1715u(1991).

In order to qualify for the program, the mortgagor had to meet specific criteria, two of which were: (1) that the mortgagor's default was caused by circumstances beyond the mortgagor's control which rendered the mortgagor unable to correct the delinquency within a reasonable time or make full mortgage payments, and (2) that there was a reasonable prospect that the mortgagor would be able to resume full mortgage payments after a period of reduced or suspended payments not exceeding 36 months. 24 C.F.R. 203.650(a)(5) and (6)(1986).

Petitioner requested that HUD accept the assignment of his mortgage but ultimately by letter

dated October 31, 1991, entitled "Final Decision on Assignment Request", HUD advised the petitioner that he had failed to meet the two (2) afore-cited criteria and had declined to accept the assignment of the mortgage. Under the applicable regulations, there was no right to have the denial decision reconsidered.

As stated above and documented within the Record and the Appendix, prior to 1991 there were documented 37 items of improper servicing of the mortgage, including monies improperly used or missing from the escrow account. Most of these 37 items were not originally acknowledged as being "mistakes" or "errors" but were ultimately proven and documented as such as is detailed in correspondence to/from First Investment. Several of these items were never resolved.

Prior to initiating any foreclosure action and prior to the assignment request, it is mandated in the HUD Regulations and the Code of Federal Regulations that all such problems must be resolved. There is also a pre-foreclosure review which must be performed and papers filed with HUD that must certify that the mortgage servicing requirements are in full compliance prior to initiating any foreclosure actions. There are also HUD Regulations and Code of Federal Regulations which mandate that certain forms must be sent and that specific meetings must be held with the homeowner prior to the initiating of any foreclosure action.

First Investment did not comply with the mandated items above and filed incomplete, inaccurate and/or false statements with HUD prior to the 1991 assignment request to HUD thus tainting the assignment request and any following actions of HUD as well as making any filings by First Investment and later by Alliance Mortgage following the assignment request either tainted or fraudulent as defined by the HUD Regulations.

In 1991, First Investment would not consider any

alternatives to foreclosure following the refusal by HUD to accept the assignment of the mortgage despite requests by the Petitioner and the HUD certified counseling agency. No meetings were held between First Investment and the Petitioner despite the mandate in the HUD Regulations and the Code of Federal Regulations.

It was only because of the continued inquiries and insistence of the HUD approved counseling agent that First Investment accepted the proposed content of a forbearance agreement.

The negotiated forbearance agreement was initiated in November of 1991, the Petitioner completed the forbearance agreement in May of 1992 and the mortgage was at that point current.

First Investment would not allow or would not accept the annual recertification of income to be made by the Petitioner's accountant in September or October of 1991 while the mortgage was in "default" or "under forbearance". Following the completion of the forbearance agreement in May of 1992, First Investment, as documented in their letter to HUD, "discovered" that the recertification had not been completed in 1991 and requested that the Petitioner immediately recertify.

The Petitioner's accountant requested specific information from First Investment as to the content of the new recertification and provided the information exactly as instructed as of June of 1992, with one error, the accidental inclusion of the income of a non-resident daughter.

First Investment used the June of 1992 financial information which had been provided by the Petitioner's accountant, which also included the non-applicable income of a non-resident spouse (as instructed by First Investment) as well as the erroneously submitted non-applicable income of the non-resident daughter, and improperly performed the calculation as if the financial

information was for October of 1991.

The resulting retroactive calculation using 1992 information as if it were 1991 and containing the improperly and erroneously included income of non-residents created a false arrearage of over $3,000.00 and improperly reduced the monthly subsidy thus increasing the required monthly payment of the Petitioner by over $300.00 per month.

The Petitioner, the Petitioner's accountant and the HUD counseling agent attempted to challenge the incorrect calculation and to provide information to First Investment concerning the incorrect calculation. Meetings were requested with First Investment to provide information including specific requests wherein the Petitioner and the Petitioner's accountant would drive from Erie, Pennsylvania to Columbus, Ohio to meet with First Investment.

The possibility of an error in the calculation was rejected by First Investment. The information and the proposed meetings were refused by First Investment.

After three months of attempts, the counseling agent prepared preliminary information and arranged with First Investment to accept it in preparation for a formal presentation to HUD concerning the incorrect calculation, which he had asked First Investment to help prepare.

First Investment forwarded the preliminary information directly to HUD without any preparation or any of the other information offered for the formal presentation. HUD rejected the information as not being adequate for review.

First Investment refused to accept any other information or to assist in any other manner in preparing the intended formal presentation to HUD. HUD refused to accept any information directly from either the Petitioner, the Petitioner's accountant or the counseling agent. HUD did not verify the calculation as

computed by First Investment.

The Petitioner quotes the last two paragraphs on page 3 of the "**OPEN LETTER TO HUD**" which is the opening to the "FORMAL COMPLAINT" document submitted to HUD by Congressman English and Senator Specter (CA.Ap.I 60-61):

> " As a direct result of a "mistake" in the recertification calculation in 1992 which reduced the subsidy and raised the payments by over $300.00 per month and created a false arrearage of over $3,000.00, the mortgage company abused and violated the Regulations by not admitting the possibility of a mistake, not accepting information from the Petitioner, the Petitioner's accountant or the local HUD counseling agent, and not allowing over ten requested meetings to attempt to correct the situation.
>
> The mortgage company continued its abuse by harassing, threatening and intimidating the Petitioner and the Petitioner's family (on more than one occasion, the daughters of the Petitioner); forcing the Petitioner, through the threat of foreclosure, to attempt to sell the family home to get out from under the impossible-to-correct improper payment amounts and the false arrearage; thus causing the family to move out after the house was thought sold and then the Petitioner finding that it was not possible to sell the property due to the incorrect payoff information from the mortgage company which included the improper payment amounts and the false arrearage, finally being forced into foreclosure because of the incorrect calculation and the false arrearage of over $3,000.00."

First Investment had incorrectly calculated the mortgage subsidy thus raising the monthly payment by over $300.00 per month creating a false arrearage of over

$3,000.00 which was beyond the Petitioner's ability to pay. This was the third time that the mortgage company had incorrectly calculated the mortgage subsidy. The Petitioner, through his accountant, attempted to send to the mortgage company what he considered to be the correct amount. The mortgage company refused to accept any "partial" payments from the Petitioner's accountant, so the money was escrowed by the Petitioner's accountant for the estimated correct payment.

Through the continued efforts of the HUD counseling agent, information was ultimately accepted by First Investment which was to be included with other information for presentation to HUD for review. The information from the counseling agent was forwarded to HUD by First Investment without any of the other information or the preparation for proper presentation. HUD rejected the information as being insufficient for review and would not allow the submission of additional information.

As the mortgage company would not allow the correction of the mistake and there seemed to be no available alternative, the home was listed with a realtor and eventually thought sold. The family moved out thinking that the house was sold at which time, faced with a "Hobson's Choice" to continue to escrow monies with no hope for saving the house and the expense of the family moving, the escrowed monies were used to pay the expenses and rent for the family's new lodgings.

The property could not be sold due to the improperly calculated payment amounts and the false arrearage included in the incorrect payoff information. The Petitioner moved back into the home without his family so that it would not be vacant or considered abandoned.

C. PROCEEDINGS IN STATE COURT:

First Investment initiated foreclosure proceedings on November 20, 1992. The Petitioner filed *Pro Se* an Answer, New Matter and Counterclaim. The Counterclaim was dismissed by the court as not being available under Pennsylvania Law wherein counterclaims in foreclosure can only relate to the original purchase transaction. The New Matter raised allegations that the mortgage was improperly serviced by First Investment.

In December of 1992, through the continued efforts of the HUD counseling agent at an unrelated meeting with HUD, HUD agreed to review the calculation.

The information that had been previously provided to First Investment was <u>again</u> submitted to HUD for review on December 22, 1992. This time it was prepared by the counseling agent for presentation with proper background and explanations for the review. In January, two additional documents were requested and were then presented to HUD.

As the foreclosure action proceeded towards trial, no additional request or review status was received from HUD. On March 4, 1993, (CA.Ap.II 460) without notice to the Petitioner, HUD issued an order to First Investment to recalculate the subsidy retroactive to October of 1991 using the full subsidy available, which was consistent with Petitioner's existing calculations.

The foreclosure action proceeded in the court. On March 11, 1993, First Investment forwarded a corrected subsidy calculation to the office of Petitioner's accountant (CA.Ap.II 461-462). As the family had been living elsewhere for eight months with the associated expenses, the monies were not immediately available to properly reinstate the mortgage.

On April 7, 1993, the counsel for First Investment discontinued the existing foreclosure action in the court

(CA.Ap.II 468-471), on the same day, he initiated a new foreclosure action with a letter of intent to foreclose (CA.Ap.II 472-476), but without the specifically mandated meetings or the mandated HUD form letter.

On April 30, 1993, the counseling agent, after repeated telephone calls, wrote a letter to First Investment in an attempt to negotiate with First Investment for any alternatives for reinstatement (CA.Ap.II 463-465). First Investment did not respond in any manner to either the telephone calls or the letter.

On May 21, 1993, the Counsel for First Investment sent a letter to the counseling agent (CA.Ap.II 466-467) which grossly misstated the facts of the situation and in conclusion stated:

> " At this particular point they [First Investment] are not interested in a further forbearance agreement and have directed us to proceed with foreclosure which indeed is occurring at this point." (names added)

On May 28, 1993, a new Complaint in Mortgage Foreclosure was filed by First Investment.

An Answer and New Matter were filed. A counterclaim concerning improper servicing was not permitted. The New Matter did raise allegations that the mortgage was improperly serviced by First Investment Company, but as stated in the **BRIEF OF APPELLANT**, Issue 4, at page 35: "the servicing of Petitioner's mortgage was removed as an issue of litigation by the state courts."

Neither the Common Pleas Court nor the Superior Court addressed the 1991 assignment request to HUD in any manner other than as stated in the Opinion of the Superior Court: "HUD considered, but denied assignment of the mortgage." (CA.Ap.I 23) and a related footnote. Said Assignment request was never reviewed by the state courts therefore the state courts could not have agreed that "the denial by HUD of the

mortgage assignment from First Investment to have been in compliance with the law".

Between 1991 and 1998, with the assistance of the HUD counseling agent, the offices of Congressman Phil English and Senator Arlen Specter, over fifty requests and/or letters were sent to various HUD offices requesting the proper procedure for filing a formal complaint with HUD to no avail. Three complaints concerning the improper servicing of the mortgage were presented and received by HUD: December 22, 1992, from the HUD counseling agent to Mr. John Oswald of HUD Pittsburgh, PA, 84 pages; October 8, 1993 from the HUD counseling agent to HUD in Columbus, OH, with copy to Mr. Mark Watkins of HUD Pittsburgh, 35 pages; July 26, 1995, from Petitioner to Mr. Mark Watkins of HUD Pittsburgh, PA, 200 pages.

On March 20, 1996, the Court of Common Pleas granted Summary Judgment to First Investment (Pet. App. 31) and a timely appeal was taken to the Superior Court of Pennsylvania with the filing of Petition and the Record on Appeal.

In April of 1997, HUD in Pittsburgh contacted the local HUD counseling agent and offered a settlement with First Investment if $80,000 in financing and other matters could be arranged within ten days. It was not possible for the Petitioner to participate within the time period required. This was addressed in his **RESPONSE TO THE OFFER OF HUD OF APRIL 1997** of May 9, 1997 (CA.Ap.I 75-78).

Unknown to the Petitioner at the time, his Counsel of Record had multiple cardiac arrests, and later a heart transplant, and did not appear for the Oral Argument before the Superior Court. It was not until after being served with a notice of judgment and the posting of notice for the Sheriffs Sale of the Petitioner's home that he became aware that he had not been represented at Oral Argument or in any manner before

the Superior Court.

After this discovery and not being able to find other counsel to assist him, the Petitioner filed a *Pro Se* motion *Nunc Pro Tunc* based upon the medical circumstances of his former counsel and lack of representation with a request to reopen and allow reargument, which was denied by the Superior Court. Even following notification of the medical circumstances of the former counsel and notification of the Petitioner proceeding *Pro Se*, the Superior Court continued to send all court related documents to the address of the non-functional former counsel.

On August 14, 1997, the Petitioner filed a Chapter 13 Bankruptcy with but one debt, the summary judgment of the foreclosure action. This was to stay the Sheriff Sale scheduled for August 15, 1997, pending his appeal to the Supreme Court of Pennsylvania which had been filed on July 29, 1997.

The Supreme Court by **ORDER** of January 8, 1998, (Pet. App. 52) stayed its proceedings due to the Automatic Stay in Bankruptcy wherein the Petitioner by Motion requested the Bankruptcy Court to Open the Stay to allow the Supreme Court to continue, which was so ordered.

On May 5, 1998, the Supreme Court denied "per curiam" both the APPLICATION FOR LEAVE TO APPEAL NUNC PRO TUNC and the PETIITION FOR EXTRAORDINARY RELIEF (Pet. App. 53), with a PETITION FOR RECONSIDERATION also denied "per curiam" on August 5, 1998 (Pet. App. 54).

It should be noted that Alliance Mortgage became the servicing agent for First Investment in 1997 and was not involved with any of the activities in the state courts from 1992 through 1998 or the 1991 assignment request to HUD. However, Petitioner alleges that Alliance Mortgage has filed a possibly false or inaccurate claim and other documents in the Federal

Bankruptcy Court based upon the possibly false, misleading, inaccurate, and incomplete information provided by First Investment Company, and as such has perpetuated the possible fraudulent nature of this matter and by the HUD Regulations and the Code of Federal Regulations is equally liable for the past actions of the mortgage company for whom it has assumed the servicing responsibilities.

D. PROCEEDINGS IN DISTRICT COURT:

On August 18, 1998, Petitioner filed the action in the District Court alleging an improper denial of the assignment of the mortgage to HUD in 1991, based upon the improper proceedings by HUD and the improper, and possibly fraudulent, information presented to HUD by First Investment, and requesting an injunction stopping the foreclosure with the Sheriff sale of his home, an invalidation of all other court proceedings and payment of costs.

In September of 1998 a "FORMAL COMPLAINT" was presented to HUD by Congressman English and Senator Specter concerning 74 specific violations of HUD Regulations and/or Federal Law by First Investment from 1983 through 1998, with over 400 pages of supporting documentation. As the information was still pending possible review by HUD, that information was precluded from being presented in the District Court as specific items of an amended complaint.

For approximately ten months, the "FORMAL COMPLAINT" had been awaiting review by HUD. Three extension requests in the District Court were justified due to the delay of HUD in reviewing or not reviewing the "FORMAL COMPLAINT" as presented to HUD by the Congressman and the Senator. This was noted with copies of the correspondence between the Congressman, Senator and HUD in documents: **MOTION FOR EXTENSION OF TIME FOR THE**

FILING OF BRIEFS (CA.Ap.I 42-106), **MOTION FOR SECOND EXTENSION OF TIME FOR THE FILING OF BRIEFS** (CA.Ap.I 153-160), **MOTION FOR THIRD EXTENSION OF TIME FOR THE FILING OF BRIEFS** (CA.Ap.I 162-169), and **PLAINTIFF'S REPLY TO FEDERAL DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR THIRD EXTENSION OF TIME** (CA.Ap.I 173-180).

As the information awaiting on HUD's review or refusal to review was precluded from presentation, that information could not be presented in the Petitioner's **FIRST AMENDED COMPLAINT** (CA.Ap.I 184-349).

The results of the HUD review or refusal to review was, because of the delay of HUD, intended for submission to the District Court as the basis of a **SECOND AMENDED COMPLAINT** which was noted in each of the extension requests listed above. This precluded information was specifically addressed in the **FIRST AMENDED COMPLAINT** at paragraph 4 (CA.Ap.I 2-3), in the **MOTION FOR LEAVE OF COURT TO FILE A FIRST AMENDED COMPLAINT** at paragraphs 3 through 7 (CA.Ap.I 370-374).

HUD refused to review on July 27, 1999, and returned the 400 page documents to the Congressman and Senator "... until this lawsuit is either dismissed or ruled on by the Federal Court.". This information was not available to the Petitioner until after the August 12, 1999, bench hearing wherein the suit was dismissed (Pet. App. 18, and ORAL ARGUMENT ON MOTIONS - COURT'S ORDER, 19-28).

This delay of HUD concerning the precluded information and the proposed **SECOND AMENDED COMPLAINT** was addressed in the **MOTION TO OPEN THE ORDER OF COURT OF AUGUST 12, 1999, AND GRANT THE AMENDING OF COMPLAINT AS A MATTER OF RIGHT AND JUSTICE, ALLOW THE INTRODUCTION OF PREVIOUSLY PRECLUDED**

INFORMATION AND COMPLAINTS AS A SECOND AMENDED COMPLAINT, OR ALLOW REARGUMENT (CA.Ap.II 503-535) and the **BRIEF OF APPELLANT** in the Circuit Court.

The District Court deniedthe **MOTION TO OPEN THE ORDER OF COURT OF AUGUST 12 ...** on September 30, 1999 (Pet. App. 29) and **MOTION TO OPEN THE ORDER OF COURT OF SEPTEMBER 30, 1999** ON December 6, 2001 (Pet. App. 30).

E. PROCEEDINGS IN THE COURT OF APPEALS:

The Petitioner appealed to the Court of Appeals for the Third Circuit which affirmed the District Court Judgment on September 21, 2000, (Pet. App 1,3-15) and denied his **PETITION OF PLAINTIFF-APPELLANT FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC** on June 29, 2001, (Pet. App. 16-17).

The Petitioner requested that the following ten areas be examined by the Court of Appeals in his **PETITION OF PLAINTIFF-APPELLANT FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC** (which is included in its entirety in the attached appendix at Pet. App. 55-76):

I. CORRECTION OF ERROR - INCORRECT HISTORY AND FACTS (Pet. App. 63)

II. CORRECTION OF ERROR - STANDING OF DEFENDANT ALLIANCE MORTGAGE (Pet. App. 64)

III. CORRECTION OF ERROR - HUD'S RELIANCE ON INFORMATION (Pet. App. 65)

IV. CORRECTION OF ERROR - NO PROCEDURE FOR AGENCY REVIEW and STATUTE OF LIMITATIONS MAY BE INAPPLICABLE (Pet. App. 67)

V. STATUTE OF LIMITATIONS MAY BE INAPPLICABLE (Pet. App. 68)

VI. MISINTERPRETED CASE LAW (Pet. App. 69)
VII. LIMITED DISCOVERY (Pet. App. 71)
VIII. ISSUE NOT ADDRESSED - EQUITABLE TOLLING (Pet. App. 72)
IX. MISINTERPRETATION OF EVENTS AS TO CONTINUING WRONG AND FRAUDULENT CONCEALMENT (Pet. App. 72)
X. ISSUE NOT BARRED BY RES JUDICATA OR FULL FAITH AND CREDIT - NOT ON MERITS WHEN ABANDONED BY COUNSEL DUE TO CARDIAC ARREST (Pet. App. 73)

Each of the items above have either been misinterpreted or overlooked by the courts below and have merit as to correcting the erroneous District Court judgment.

REASONS FOR GRANTING THE WRIT

I. THIS CASE RAISES THE ISSUE OF A SPLIT BETWEEN THE CIRCUITS AS TO BEING BOUND BY THE ADMINISTRATIVE PROCEDURES ACT OR THE FEDERAL TORT CLAIMS ACT OR BOTH

Petitioner contends that the suit as to HUD is against HUD as an agency, not a suit against the United States under 2401(a), as HUD, in the context of the suit, is partially functioning in the common marketplace having assumed the roles of insurance company and lender, and, as such, does not have the protection of the limitation period under (a) or (b). *(See* Pet. App. 69) AND/OR the limitations period has been equitably tolled (*See* Pet. App. 72) or has not yet begun to run under either (a) or (b) due to the actions and possible fraud and estoppel of HUD (*See* Pet. App. 65 and 72), and multiple unanswered complaints filed with HUD

from 1991 through 1998, intertwining APA and FTCA with incidents documented from 1983 through 1998 (*See* Pet. App. 67) with case law supporting the Petitioner's theory of continuing wrong and possible fraudulent concealment as to all Defendants (*See* Pet. App. 72).

As to 2401(a), the Petitioner has raised the issue of a split among the various circuits concerning if this is a suit "against the United States" rather than a suit against HUD as an "Agency conducting business in the common market place". Petitioner relied upon AMMCON INC. V KEMP, 826 26 F.Supp. 639 (E.D. of NY, 1993) whereas HUD suggested and the District Court followed PORTSMOUTH REDEVELOPMENT AND HOUSING AUTHORITY V. PIERCE, 706 F.2d 471, (4th Cir. 1983), quoting from the COURT'S ORDER (Pet. App. 25):

> "the court reached the opposite conclusion, finding that an action against a federal agency or official will be treated as an action against the sovereign, if a judgment sought would expend itself on the public treasury or domain or interfere with the public administration or if the effect of judgment would be restrained to the government from acting or compelling it to act. The court concluded, more specifically to the point, that any monetary judgment recovered in the case would expend itself on the public treasury. There is no separate fund for payment of operating subsidies within HUD's exclusive control, the origin of which is not the public treasury."

The Petitioner suggests that the better case law is from the District of Columbia Circuit wherein **HUD, for its own benefit, has taken the opposite stance** from which it has taken in this matter within the Third

Circuit, and cites DRG FUNDING CORPORATION V. SECRETARY OF HOUSING AND URBAN DEVELOPMENT, 76 F.3D 1212 (D.C. Cir, 1996) which states:

> "... HUD argues, however, that § 3728 is inapplicable because DRG's judgment against HUD is not a "judgment against the United States Government presented to the Comptroller General," the terms triggering § 3728. HUD is an agency that may "sue and be sued," under 12 U.S.C. § 1702, and has an independent revolving fund for the payment of judgments. So the Comptroller General is simply not involved in payment of DRG's judgment."

As monies such as Civil Money Penalties and judgments (as directed by the GAO into the General Insurance Fund) as well as from insurance premiums, fees, etc., there are funds available to satisfy a possible judgment, or, judgment could be limited to only those specific funds derived from penalties and/or judgments. Therefore, this action is a suit against HUD in its role as an Agency doing business in the common market place, which eliminates 2401(a) statute of limitations. (*See also*: **PETITION OF PLAINTIFF-APPELLANT FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC**: MISINTERPRETED CASE LAW at Pet. App. 69.)

As to 2401(b), there is new case law from the Eighth Circuit (filed on July 5, 2001): AUDIO ODYSSEY, LTD. V. UNITED STATES OF AMERICA AND THE UNITED STATES SMALL BUSINESS ADMINISTRATION, 255 F. 3rd 512 (C.A. 8, Iowa 2001). This new case law closely parallels many of the matters in the instant case being appealed as well as items contained in the Petitioner's First Amended Complaint

and the proposed Second Amended Complaint based upon the complaints filed with and not addressed by HUD, said amendments were rejected by the lower Courts.

The petitioner is raising the issue of whether the district and circuit courts correctly interpreted the context of his pro se allegations in his initial complaint as well as in his attempts to amend the same.

Petitioner does not have the benefit of a legal background, but is nevertheless attempting to bring substantiative issues to the court's attention. He is cognizant that his theories may not be framed in the manner which the court is accustomed to seeing, but, nevertheless, petitioner is of the opinion that had he been afforded the opportunity to develop his case further with limited discovery (*See* Pet. App. 71), he would have raised sufficient viable issues to withstand the action of the district court in dismissing his case.

Petitioner attempted in his pro se representation to raise the issues liability under the Federal Tort Claim Act on the theory of third-party beneficiary, but was denied the right to do so by the district judge's actions in granting the motions filed by the defendants. Petitioner alleges that affording him the right to file an amended complaint as well as the affording the right of limited discovery, would have developed sufficient facts to convince the court that a contractual claim of negligence "in failing to perform mandatary procedures" and "breach of contract" under the rationale of the new case law of Odyssey would have had merit.

II. THIS CASE PRESENTS A MATTER OF FIRST IMPRESSION AS AN IMPORTANT QUESTION ARISING UNDER THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The pertinent section of the 14th Amendment provides that:

> "...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law ..."
> (Underlines added)

It has been a principle of American jurisprudence as defined by this Court that "the right to counsel" is a well defined right and is available through the application of the 14th Amendment.

It is not the Petitioner's theory that he had an absolute "right to counsel", but that having retained private counsel to protect his interests throughout the complex foreclosure litigation in state court, he had the right not to be deprived of his "property" without "due process".

Petitioner alleges that the absence of his privately retained counsel at the critical stage of an appellate proceeding deprived him of our adversarial system of justice and the opportunity to attempt to logically sway the judicial panel which sat in judgment of his appeal.

It is critical to understand that the unintentional absence of his counsel was unknown to petitioner until such time as he was unable to take the necessary steps to protect his interests, and, after the time to file a timely appeal.

The Petitioner, by his retained counsel, filed a timely appeal with the Pennsylvania Superior Court and later filed the proper record and briefs. The Prothonotary of the Superior Court mailed the schedule for oral argument to the office address of Petitioner's counsel, who at the time of said notice of argument, was hospitalized and awaiting a heart transplant.

No steps were taken to advise the petitioner of the fact that counsel was incapacitated and petitioner remained ignorant of the events which had transpired regarding his counsel.

On or about June 17, 1997, Petitioner's residence was posted with a "Notice of Sheriff Sale" by a member of the Erie County Sheriff's Department which listed the property sale to be held on August 15, 1997, and Petitioner being served with a **NOTICE OF ORDER, DECREE OR JUDGMENT** (Pet. App. 50) for $108,547.24.

Petitioner attempted to contact the office of his counsel only to find the telephone disconnected. He was able to contact an adjacent business and was advised of the medical situation of his counsel. Petitioner called the local HUD counseling agent who obtained a copy of the opinion of the Superior Court of Pennsylvania via fax (Pet. App. 41, 42-49) and learned for the first time that his case was heard on "oral argument" without the benefit of counsel and that it was beyond time for the filing of an appeal.

With the assistance of the HUD counseling agent, Petitioner sought replacement counsel to no avail.

Petitioner sought immediate relief from the Superior Court in the form of a *Pro Se* **PETITION FOR EXTRAORDINARY RELIEF DUE TO MEDICALLY INCAPACITATED COUNSEL OF RECORD** wherein he advised the court of the circumstances surrounding the absence of his counsel from oral argument and requested opening the judgment and allow reaugument.

The Superior Court denied his request (Pet. App. 51) which the Petitioner was unaware for several days following as the Superior Court continued to send all court documents to the office of the non-functioning former counsel.

The petitioner sought relief in the Supreme Court of Pennsylvania in the form of an application seeking

the right to file an appeal from the judgment of the Superior Court of Pennsylvania in the form of an **APPLICATION FOR LEAVE TO APPEAL NUNC PRO TUNC** and a **PETITION FOR EXTRAORDINARY RELIEF.**

Said application and petition were denied "*per curium*" by the Supreme Court of Pennsylvania on May 4, 1998 (Pet. App. 53). A subsequent **PETITION FOR RECONSIDERATION** was also denied "*per curium*" on August 5, 1998.

See also: **PETITION OF PLAINTIFF-APPELLANT FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC**: ISSUE NOT BARRED BY RES JUDICATA OR FULL FAITH AND CREDIT WHEN ABANDONED BY COUNSEL DUE TO CARDIAC ARREST at Pet. App. 73-76.

The petitioner has continued to represent himself in the form of *pro se* litigation.

He has been unable to locate any case law wherein the issue presented in the foregoing set of facts has ever been addressed by a court of competent jurisdiction and he is of the opinion that this may well be a case of first impression.

Petitioner was represented by privately retained counsel from filing of pleadings and argument in the Court of Common Pleas in 1993 to the timely filing of a proper appeal to an appellate court and the counsel-assisted preparation of the record and briefs until his medical circumstance.

The petitioner contends that his due process rights as guaranteed under the 14th Amendment of the U.S. Constitution were violated by the absence of his private counsel at the appellate oral argument before the Superior Court of Pennsylvania. These protected rights were further impinged upon by the non-participation of said counsel in the subsequent judicial proceedings whereby the petitioner sought to correct the wrong

caused by the Superior Court of Pennsylvania in proceeding to hear petitioner's case in the absence of counsel.

The state judicial system compounded this error by ignoring the fact that petitioner had advised the said court of the condition of his counsel of record, and continued to remit correspondence to the office of petitioner's counsel, in further context of a breakdown in the courts.

Petitioner contends that a true judgment "on the merits" was impossible due to the non-participation of his counsel at the oral argument before the appellate court, and "full faith and credit" as well as "res judicata" cannot be accorded to a judgment predicated on the facts as set forth by petitioner.

Petitioner attempted to seek an appeal to the Supreme Court of Pennsylvania "nun pro tunc", but was denied the same in a "per curium" opinion by the court. The due process issue being presented to the U.S. Supreme Court was ignored by the said Supreme Court of Pennsylvania in denying petitioner the right to file an appeal, nun pro tunc.

It is a fundamental right that a person who chooses to retain counsel to protect his interest has the right to expect that one's rights will be thus so protected. To be deprived of the full advantage of an oral argument conducted by competent appellate counsel is something which no court, and <u>especially this Court</u>, should not leave unaddressed. And "full faith and credit" as well as "Res Judicata" should not be afforded to matters that are not a true judgment on the merits.

III. RES JUDICATA:

The Petitioner has argued that he should have the right to litigate the issue of improper servicing, and that such issue is not barred by the doctrine of *res judicata* as determined by the District Court and the

Circuit Court.

The Third Circuit's Opinion states that "Under Pennsylvania law, res judicata occurs when the two actions 'share an identity of the (1) thing sued on; (2) cause of action; (3) persons and (4) quality or capacity of the parties suing or sued.", citing GREGORY V. CHEHI, 843 F.2D 111, 116 (3rd Cir. 1988)

The Petitioner submits that the Circuit Court has mis-read the record of the proceedings in the state court and, thus, has misapplied the doctrine of *res judicata.*

The action in the state courts which was addressed by the Pennsylvania Superior and Supreme Courts was an action by First Investment Company as mortgagee against the Petitioner as mortgagor. No other parties were involved. The action in Federal Court was an action against Andrew M. Cuomo, the then Secretary of HUD, and also against Alliance Mortgage Company of Jacksonville Florida, as well as against First Investment Company as to improper servicing of the mortgage, possible fraud, violations of HUD regulations and Federal Law.

As neither the Secretary of HUD nor Alliance Mortgage Company were parties in the state court proceedings, it is the position of the Petitioner that the doctrine of *res judicata* was misapplied by the Circuit Court in its Opinion.

As the action in state court was in mortgage foreclosure and a counterclaim is not permitted unless it relates directly to the actual mortgage agreement, the matter of improper servicing of the mortgage could not be presented or litigated in that action.

The record does not support the standing issue of Alliance Mortgage as stated by the Circuit Court when in its Opinion it is stated that "Alliance Mortgage Company is the successor in interest to First Investment". No-where in the record relied upon by the Third Circuit is there evidence of Alliance Mortgage

being a "successor in interest to First Investment". To the contrary, there is evidence that Alliance Mortgage is the paid servicer of the mortgage (*See* Pet. App. 64).

Petitioner is arguing that the Third Circuit Court of Appeals has misapplied the doctrine of *res judicata* and, as such, the actions against all of the Defendants are not bound by *res judicata*. Therefore , it is the Petitioner's contention that in invoking the doctrine of *res judicata* as to the improper servicing issue, fraud and violations of law, both the District Court and the Circuit Court committed reversible error.

IV. CORRECTION OF ERROR:

The Petitioner suggests that the Third Circuit improperly adopt an erroneous set of facts which conflicts with the record, gave improper standing to Defendant Alliance Mortgage as being successor in interest to Defendant First Investment and improperly predicate its opinion as to all Defendants on the said erroneous facts and standing. These arguments were fully stated in the **PETITION OF PLAINTIFF-APPELLANT FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC** (which is included in its entirety in the attached appendix at Pet. App. 55-76)

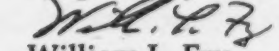
The specific arguments are too voluminous to be presented herein, but should be addressed as reversible error. The are as follows: CORRECTION OF ERROR - INCORRECT HISTORY AND FACTS (Pet. App. 63), CORRECTION OF ERROR - STANDING OF DEFENDANT ALLIANCE MORTGAGE (Pet. App. 64), CORRECTION OF ERROR - HUD'S RELIANCE ON INFORMATION (Pet. App. 65), CORRECTION OF ERROR - NO PROCEDURE FOR AGENCY REVIEW and STATUTE OF LIMITATIONS MAY BE INAPPLICABLE (Pet. App. 67), ISSUE NOT ADDRESSED - EQUITABLE TOLLING (Pet. App. 72) and MISINTERPRETATION OF EVENTS AS TO

CONTINUING WRONG AND FRAUDULENT CONCEALMENT (Pet. App. 72).

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully Submitted,



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November, 2001

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-3985

WILLIAM L. FRY,

Appellant

v.

ANDREW M. CUOMO,
Secretary of the Department of
Housing and Urban Development;
FIRST INVESTMENT COMPANY
OF COLUMBUS, OHIO,
an Ohio Corporation;
ALLIANCE MORTGAGE COMPANY
OF JACKSONVILLE, FLORIDA,
a Florida Corporation

On Appeal From the United States District Court
For the Western District of Pennsylvania
(W.D. Pa. Civ. No. 98-00236)
District Judge: Honorable Sean J. McLaughlin

Submitted Under Third Circuit LAR 34. 1 (a)
September 14, 2000

Before: MANSMANN, BARRY and GARTH,
CIRCUIT JUDGES

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Western District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a). On consideration whereof, it is now here ORDERED AND ADJUDGED by this court that the judgment of the District Court entered October 1, 1999, be and the same is hereby affirmed. Costs taxed against the Appellant. All of the above in accordance with the opinion of this Court.

ATTEST:
s/ Marcia M. Waldron
Clerk

DATED: September 21, 2000

UNREPORTED-NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-3985

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CIRCUIT JUDGES

(Filed September 21, 2000)

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PER CURIAM

Appellant William Fry appeals the District Court's denial of his motion to amend his complaint and its dismissal of the complaint on the grounds that the complaint and the proposed amendments were barred by the statute of limitations and the principles of res judicata. Because we find that Fry's complaint was properly dismissed and his proposed amendments were futile, we will affirm the District Court's order.

I.

In 1982, Fry and Appellee First Investment Company (Appellee Alliance Mortgage Company is the successor in interest to First Investment) entered into a mortgage agreement for the purchase of Fry's residence. The loan was insured under the National Housing Act, which subsidizes monthly mortgage payments for eligible beneficiaries. The program was administered by Appellee U.S. Department of Housing and Urban Development (HUD). On May 1, 1991, Fry defaulted on his mortgage loan. Under a special HUD program at that time, HUD-insured mortgage-holders could request to have HUD accept assignment of the mortgage to avoid impending foreclosure, but only if the mortgagor's default was caused by a temporary financial crisis beyond the mortgagor's control. 12 U.S.C. § 1715u (1991). Thus, to qualify for the program, mortgagors had to meet six criteria, two of which were: 1) that the mortgagor's default was caused by circumstances beyond the mortgagor's control which rendered the mortgagor unable to correct the delinquency within a reasonable time or make full
{pg 3}
mortgage payments, and 2) that there be a reasonable prospect that the mortgagor would be able to resume

full mortgage payments after a period of reduced or suspended payments not exceeding 36 months. 24 C.F.R. § 203.650(a)(5) and (6)(1986).[1] Fry requested that HUD accept assignment of the mortgage under this program, but HUD informed him by letter that their preliminary information showed he did not meet the above two requirements. HUD advised Fry that it needed more information from him to determine if he met the program's qualifications. Fry provided HUD with more information. By letter dated October 31, 1991, entitled "Final Decision on Assignment Request," HUD informed Fry that, after review of the information he had provided them, he still failed to meet the two criteria above and that his request for assignment was declined. Under the applicable regulations, there was no right to reconsideration of the decision.

After Fry's request for assignment was denied, he and First Investment reached a forbearance agreement with the help of a HUD-certified counseling agency. By May 15, 1992, the account was current. Shortly thereafter, a dispute arose between Fry and First Investment regarding the amount of the subsidized and unsubsidized portions of the loan, which would affect the amount of Fry's loan payment. The dispute was submitted to

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HUD for resolution, and on September 10, 1992, HUD determined that First Investment's calculations were correct. During the dispute, Fry made no payments on the loan. On November 20, 1992, First Investment

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[1] These regulations were in effect at the time of Fry's request for assignment. They have since been amended when this assignment program was terminated by Congress. See Ferrell v. U.S. Department of Housing and Urban Development, 186 F.3d 805, 812 (7th. Cir. 1999) (providing history of Congress's termination of mortgage assignment program).

referred the account for foreclosure. Fry submitted new information to HUD, and on March 4, 1993, HUD reversed itself and altered the subsidy amounts to agree with Fry's calculations, retroactive to October 1991. Despite Fry's victory, he still made no payments on his loan. Again First Investment started foreclosure proceedings, filing a complaint in mortgage foreclosure in state court on May 28, 1993. First Investment's motion for summary judgment was granted by the state court, and Fry appealed on the issue of whether First Investment's alleged improper servicing of the mortgage was an equitable defense to foreclosure. The improper servicing, Fry claimed, included First Investment's errors in calculating the subsidized amount and the misinformation supplied to HUD that perpetuated this error. The Pennsylvania Superior Court affirmed the lower court's foreclosure judgment, holding that Fry had no defense because any errors that might have been made by First Investment were rectified when the subsidy amount as calculated by Fry was reinstated retroactive to October 1991. Fry's petition for allowance of appeal in the Pennsylvania Supreme Court was denied.

On August 14, 1998, Fry filed the present complaint, which related only to his 1991 request to HUD for assignment. In the original complaint, Fry stated that HUD's refusal to grant the assignment was arbitrary and capricious. He requested an order
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directing HUD to take assignment of the mortgage. First Investment and Alliance Mortgage filed a response to the complaint. HUD filed a motion to dismiss or for summary judgment on the basis of the six-year statute of limitations for actions against the United States. 28 U.S.C. § 2401(a). This motion was followed by the mortgage companies' motion to dismiss on the basis of state statutes of limitations and res judicata from the

state foreclosure judgment. Rather than respond to the dismissal motions, Fry filed several motions for extension of time, in which he implied that he wished to expand his complaint to include additional claims against HUD and the mortgage companies. The gist of these additional claims was Fry's allegation that First Investment had filed incomplete or untrue information with HUD in 1991, 1992, and 1993, which resulted in HUD not taking assignment of the mortgage and in the foreclosure. Under HUD regulations, mortgagees are to file correct information and may be subject to civil penalties if the information is inaccurate or mortgages are improperly serviced. 24 C.F.R. 30.35. Thus under Fry's theory, First Investment was liable for not complying with HUD's regulations and HUD was liable for not enforcing its regulations.

Fry eventually filed a motion for leave to amend his complaint. The District Court held oral argument on August 12, 1999. At the hearing, Fry asserted several defenses against the statute of limitations: (1) the defendants' actions regarding the foreclosures in 1992 and 1993 amounted to continuing wrongs, which should delay the start of the limitations period; (2) the false information filed with HUD was fraudulent conduct,
{pg 6}
which should delay the start of the limitations period; (3) the limitations period should be tolled because of a disability; (4) the limitations period should be tolled while he attempted to file a complaint with HUD; and (5) his action was against HUD, not the United States, so the six-year statute of limitations for actions against the United States was not applicable. At the hearing, the judge issued his ruling from the bench, granting the motions to dismiss and denying Fry leave to amend because his proposed amendments were futile. Fry subsequently filed two motions to reconsider the August 12 order, one of which was denied; the other had not

been acted upon at the time of this appeal, but has since been denied. Fry timely appeals the judgment and the denial of his motion to open the judgment. He also takes issue with the District Court's failure to respond to his second motion to reconsider the judgment.

II.

We will begin with the District Court's dismissal of the original complaint. Fry's claim against HUD was barred by the six-year statute of limitations. Judicial review of final agency actions by HUD under the assignment program is governed by the Administrative Procedures Act (APA), 5 U.S.C. § 706. See, e.g., Armstead v. U.S. Dep't. of Health and Human Services, 815 F.2d 278, 281 (3d. Cir. 1987). The statute of limitations for civil actions under the APA is six years. 28 U.S.C. § 2401(a); Commonwealth of Pennsylvania Dep't. of Public Welfare v. U.S. Dep't of Health and Human Services, 101 F.3d 939, 944-45 (3d. Cir. 1996). The right to bring a civil suit

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challenging an agency action accrues "upon the completion of the administrative proceedings." Crown Coat Front Co. v. United States, 386 U.S. 503, 511 (1967). In this case, Fry's claim accrued on October 31, 1991, the date of HUD's final decision, because the regulations do not contemplate any further administrative review of assignment decisions. Fry filed the present complaint on August 14, 1998, well past the six-year limitations period. Therefore, his claim against HUD is clearly time-barred.

As for Fry's original complaint against the mortgage companies, it is unclear that Fry even stated a claim against these defendants. His claim is based on HUD's alleged arbitrary and capricious decision not to accept the assignment of the mortgage and the relief he requests is an order directed at HUD. Even if he did

state a claim under tort or contract theories against the mortgage companies, it would be barred by Pennsylvania's two-year statute of limitations for torts, four-year statute of limitations for breach of contract, or the catch-all six-year statute of limitations for any civil action without a specified limitations period. 42 Pa.Cons.Stat.Ann. § 5524 (torts); 42 Pa.Cons.Stat.Ann. § 5525 (breach of contract); 42 Pa.Cons.Stat.Ann. § 5527 (miscellaneous civil actions).

As a defense against the statute of limitations, Fry asserts that the actions by HUD and the mortgage companies after the assignment request constitute a "continuing wrong." This defense can be raised if a defendant's conduct is part of a continuing practice, in which case the action is timely as long as the last act evidencing the

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continuing practice falls within the limitations period. Brenner v. Local 514, United Bhd. of Carpenters & Joiners of Am., 927 F.2d 1283, 1295 (3d Cir. 1991). Here, Fry alleges that the subsequent fraud or negligence surrounding the foreclosure actions is part of HUD's and the mortgage companies' continuing practice of unlawful conduct. These alleged acts of fraud or negligence are not part of the same practice that led to the denial of the assignment request. HUD based its denial on the fact that Fry himself had failed to show that his default was caused by circumstances beyond his control and that there was a reasonable prospect that he would be able to resume full mortgage payments. The denial was based entirely on information provided by Fry and was therefore unrelated to any misinformation by the mortgage companies. Because the wrong, if any, ended with HUD's decision to deny Fry's request for assignment of mortgage based on information he provided them, the continuing wrong defense is not available to Fry.

Fry's next defense is that the statute of limitations should be tolled while he was disabled. The federal statute of limitations only provides for a delay in the commencement of the limitations period if a person is under a disability when the claim accrues. 28 U.S.C. § 2401(a). Fry's disability occurred in November of 1995 and continued until February 1996. Thus it did not delay the start of the limitations period. Fry's disability, which lasted at most four months, would also be insufficient to toll the limitations period because Fry filed suit approximately nine months past the expiration of the limitations period.
{pg 9}

Fry also argues that the limitations period should not begin until he has exhausted his remedies, which he was attempting to do by filing a document entitled "Formal Complaint," with HUD. In cases where no formal agency review procedures exist, however, a cause of action accrues when the final agency action occurs; any letter or filings with agency officials does not result in a later date of accrual. See Impro Products, Inc. v. Block, 722 F.2d 845, 850 (D.C. Cir. 1983). Here, because no procedures exist for agency review of the denial of an assignment request, the date of accrual for Fry's cause of action was the date of HUD's final decision.

Additionally, Fry argues that HUD's fraudulent conduct should delay the commencement of the limitations period. The fraudulent conduct defense is inapplicable on these facts because HUD rejected assignment based on information provided by Fry. Thus even had First Investment provided false information to HUD, HUD had sufficient reasons for its denial independent of information provided by the mortgage companies.

In District Court, Fry raised the issue that § 2401's limitations period should not apply because his

complaint was against an agency of the United States government, not against the United States government, citing to Ammcon, Inc. v. Kemp, 826 F.Supp. 639 (E.D.N.Y. 1993). For the reasons stated by the District Court, the reasoning of Ammcon, even if we were to agree with its holding, is not applicable. Unlike in Ammcon, which involved a dispute between HUD and a contractor to recover construction funds within HUD's control on a theory of unjust enrichment, Fry seeks equitable relief. Even if he
{pg 10}
seeks monetary relief, a monetary reward would be paid out of public funds, making his claim one against the United States government.

The second issue presented by Fry is whether the District Court was correct in denying his motion to amend the complaint. Admittedly, the correct procedure would have been to allow Fry to amend the complaint as of right against HUD, because HUD had not filed a responsive pleading. Fed.R.Civ.P. 15(a). As to additional claims against the mortgage companies--who did file a response--Fry was required to seek leave to amend. See Barksdale v. King, 699 F.2d 744, 747 (5th Cir. 1983)(holding that where some but not all defendants have answered, a plaintiff may amend as of right with regard to the non-answering defendants). Because we agree with the District Court's conclusion that the amendments proposed by Fry were futile as to both defendants, however, any error by the District Court did not prejudice Fry. See Mitchell v. Collagen Corp., 67 F.3d 1268, 1273-74 (7th Cir. 1995), vacated on other grounds, 518 U.S. 1030 (1996) (holding that a district court need not permit the filing of an amended complaint, even when no responsive pleading has been filed, when examination of the proposed complaint makes clear that it does not cure the deficiencies of the original pleading and the amended complaint is doomed

not to survive a motion to dismiss). Amendment of the complaint is futile if the amendment will not cure the deficiency in the original complaint or if the amended complaint cannot withstand a renewed motion to dismiss. Jablonski v. Pan American World Airways, Inc., 863 F.2d 289, 292 (3d Cir. 1988). Even after an {pg 11}
expansive interpretation of Fry's proposed claims, we agree with the District Court that amendment of the complaint would be futile.

First, any action predicated on the request for assignment to HUD is barred by the statute of limitations, as discussed above. Second, any action against the mortgage companies for improper servicing of the mortgage contract that resulted in foreclosure is barred by res judicata. Federal courts must "give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the state in which the judgment was rendered." Migra v. Warren City School Dist. Bd. of Ed., 465 U.S. 75, 81 (1984). Under Pennsylvania law, res judicata occurs where the two actions "share an identity of the (1) thing sued on; (2) cause of action; (3) persons and parties to the action; and (4) quality or capacity of the parties suing or sued." Gregory v. Chehi, 843 F.2d 111, 116 (3d Cir. 1988). Here, the foreclosure action in the Pennsylvania courts shares the same parties as Fry's claims against the mortgage companies. On appeal of the judgment, Fry specifically raised an equitable defense of improper servicing of the mortgage by First Investment. The Superior Court rejected that defense, stating that any improper servicing was remedied when First Investment reinstated the subsidized amount of the loan as calculated by Fry retroactive to 1991. The same facts and issues as Fry seeks to introduce in his amended complaint were raised on appeal to the Superior Court and were decided by that court. Thus under the Full

Faith and Credit statute, 28 U.S.C. § 1738, we must honor the Pennsylvania courts' determination that the mortgage companies
{pg 12}
remedied any improper servicing.

Finally, Fry wishes to bring a claim against the defendants based on the fact that the mortgage companies provided HUD with incomplete or untrue information from 1991 to 1993, contrary to HUD regulations. Again, this claim against the defendant mortgage companies is precluded by res judicata, as the Pennsylvania courts have concluded that any misinformation or error was remedied by the mortgage companies. What remains is a claim against HUD for not enforcing its regulations by ensuring that the information provided to it was accurate. This lack of enforcement, Fry alleges, was the cause of HUD's denial of his assignment request and also led to the error in computation of the subsidized portion of his mortgage loan, which precipitated the foreclosure on his home. It is well established, however, that an agency's decision not to enforce its regulations creates a "presumption of unreviewability." Heckler v. Chaney, 470 U.S. 821, 832 (1985).

The presumption of unreviewability may be rebutted where Congress has provided meaningful standards for the agency to follow for exercising its enforcement powers in the substantive statute. Id. at 833. Although in his amended complaint Fry does cite to violations of HUD regulations, he does not point to any language in the authorizing statutes that requires HUD to enforce these regulations or guides their enforcement efforts. Our own review of the applicable statutes in force during the time of the events in Fry's complaint did not reveal any guidelines or standards for HUD enforcement. Thus,
{pg 13}

the Chaney presumption is not rebutted because Congress has provided no guidelines, or law to apply, to constrain HUD's investigation and prosecution of violations of its regulations. See, e.g., American Disabled for Attendant Programs Today v. U.S. Dep't of Housing and Urban Development, 170 F.3d 381, 386 (3d. Cir. 1999) (finding unreviewable a claim that HUD refused to enforce its own regulations regarding handicap accessibility of multi-family housing projects). Therefore, we have no choice but to conclude that the decision to enforce its own regulations is committed exclusively to HUD's discretion.

Because the District Court's thorough review of the proposed amendments to the complaint revealed that Fry's claims would have been barred by the statute of limitations or would have been dismissed for failure to state a claim, we will affirm the District Court's denial of Fry's motion to amend his complaint.

Fry also filed a motion to re-open the District Court's judgment, styled under Fed.R.Civ.P. 59 and 60, which the District Court denied. We will affirm the District Court's order denying the motion because Fry essentially reargued his claims made earlier. He did not provide the requisite showing of a manifest error of law or fact, nor did he present newly discovered evidence. Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985). Fry also states that he "appeals" the District Court's inaction regarding his second motion to re-open the District Court's decision to deny his reconsideration motion. We interpret his "appeal" as a request for this court to issue a writ of mandamus compelling the

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District Court's decision on this latest motion. Because the District Court has denied this motion, Fry's request is now moot.

{pg 15}

TO THE CLERK:

Please file the foregoing opinion.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-3985

WILLIAM L. FRY

V.

ANDREW M. CUOMO, Secretary of the Department Housing, and Urban Development; THE FIRST INVESTMENT COMPANY OF COLUMBUS, OIHO, an Ohio Corporation; ALLIANCE MORTGAGE. COMPANY OF JACKSONVILLE, FLORIDA, a Florida Corporation

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Present: BECKER, Chief Judge
SLOVITER. MANSMANN, SIRICA, NYGAARD, ALITO. ROTH, MCKEE, RENDELL, BARRY, AMBRO. FUENTES and GARTH, Circuit Judges

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SUR PETITION FOR REHEARING

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing and a majority of the circuit judges of the circuit in regular active

service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

s/ Carol Los Mansmann
Circuit Judge

JUN 29, 2001

*Judge Garth voted only as to panel rehearing.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WILLIAM L. FRY	:	
Plaintiff,	:	
	:	
vs.	:	
	:	Civil Action
ANDREW CUOMO, SECRETARY	:	No. 98-236
OF U.S. DEPARTMENT OF	:	Erie
HOUSING AND URBAN	:	
DEVELOPMENT, et. al.,	:	
	:	
Defendants		

ORDER OF COURT

AND NOW, this 12th day of August, 1999, for reasons set forth on the record during argument before this Court, August 12, 1999, the Plaintiff's Motion for Leave to file an Amended Complaint is DENIED, the Defendants, motions to Dismiss [Doc. No. 13 and 16] are GRANTED and this case is DISMISSED.

s/ Sean J. McLaughlin
Sean J. McLaughlin
United States District Judge

ORAL ARGUMENT ON MOTIONS
(COURT'S ORDER)

Proceedings held before the HONORABLE SEAN J. McLAUGHLIN, U.S. District Judge, in Courtroom A, U.S. Courthouse, Erie, Pennsylvania, on Thursday, August 12, 1999.

APPEARANCES:

WILLIAM L. FRY, appearing Pro Se.

MICHAEL C. COLVILLE, Assistant United States Attorney, appearing on behalf of the Federal Defendant.

LOUIS P. VITTI, Esquire, appearing on behalf of Defendants First Investment Company and Alliance Mortgage Company

Ronald J. Bench, RMR - Official Court Reporter

{pg 2} **PROCEEDINGS**

(Whereupon, the following excerpt of proceedings was transcribed.)

THE COURT: All right, this will be an order. The background to this is as follows. The defendants originally filed motions to dismiss the plaintiff's complaint. Thereafter, the plaintiff was given a number of extensions within which to respond to those motions substantively. In lieu of that, the plaintiff filed a motion to amend his complaint, document number 30, specifically requesting that leave be granted by the court to file first amended complaint.

The defendants, that is the federal defendant and the mortgage co-defendant, have objected to plaintiff's

request to file an amended complaint, primarily on the basis that such amendment under the circumstances would be futile.

As a preliminary matter, the court notes that it is well-settled that in ruling on a motion to dismiss, all reasonable inferences must be drawn in favor of the non-movant.

Furthermore, given the fact that the plaintiff in the present case is proceeding pro se, the court is also cognizant of the fact that by virtue of that status, a more liberal interpretation of the pleading or pleadings generated by the pro se individual is appropriate. And the court specifically
{pg 3}
adopts that approach.

Now, with respect to the background or the allegations which form the subject matter of this complaint, they are, when I say this complaint, I am now referring to the amended complaint, they are set forth in great detail in some 98 pages, plus attachments.

By way of summary, it appears that the plaintiff had purchased a home in Erie, Pennsylvania, on or about August 25th of 1982. The plaintiff subsequently found himself in default on his mortgage on or about May of 1991. Subsequent to that time, he had applied pursuant to a HUD Assignment Program, which is now defunct, previously authorized pursuant to Public Law 104-99, Section 407(b). In October of 1991, HUD, after having considered the application for an assignment of the mortgage, rejected it.

In Count 1 of the complaint, which is styled Fry versus HUD, action in declaratory judgment, the plaintiff requests in his amended complaint that the court enter a judgment directing HUD to take the assignment as requested in 1991.

Or in the alternative, to direct HUD to assist the

Plaintiff/Homeowner with loan modification, to include the principle as of July, 1991, plus the legitimate expenditures of insurance and taxes since 1991.

Or in the alternative, direct HUD to assist

{pg 4}

the Plaintiff/Homeowner with recasting the mortgage with another mortgagee to include the principle as of July of 1991, plus the legitimate expenditures of insurance and taxes since 1991.

Finally, in the alternative, to direct HUD to assist the Plaintiff/Homeowner with any of the alternatives that would be available under the modifications as noted in the Federal Register.

There is also a request that costs of the suit be awarded and the reasonable equivalent of attorney's fees.

Count 2, breach of assistance contract against HUD. The same relief is requested

Count 3, styled breach of mortgage Insurance contract against HUD. The same relief is requested. And Mr. Pry also asks the court to enter a judgment that would invalidate all the proceedings concerning the mortgage that have occurred since 1991 which would not have occurred if the assignment of the mortgage had been taken when requested. Parenthetically, on this record, that means October of 1991.

Count 4 is styled breach of mortgage contract. Requests similar relief.

Count 5 is styled punitive damages - assistance contract. Plaintiff seeks damages pursuant to Title 42 of the Pennsylvania Code, Section 8371. Requests punitive damages.

Count 6 requests punitive damages against HUD.

Count 7 versus First Investment Company, an action in

{pg 5}

declaratory judgment And it requests that the court enter a judgment that would order First Investment to withdraw the foreclosure action of 1991 and void all actions related to HUD since 1991. Withdraw all actions in all courts since 1991 and refund all moneys received under the forbearance agreement that were paid in '91 and '92.

Count 8 is styled action in declaratory judgment against First Investment - mortgage insurance contract. And it requests that I grant the same relief requested in Count 7.

Count 9, action in declaratory judgment against First Investment.

Count 10, action in declaratory judgment against First Investment under assistance contract, requesting the same relief.

Count 11, an action against First Investment for declaratory judgment - mortgage contract, essentially requesting the same relief. Also requests that all actions in all courts since '91 be withdrawn And that First Investment refund all moneys received under the forbearance agreement that were paid in 199i and 1992.

Count 12, against First Investment, action in declaratory judgment - mortgage insurance contract. Essentially, asks for similar relief.

Count 13, action in declaratory judgment - assistance contract.

{pg 6}

Count 14, action in declaratory judgment - mortgage
contract.

And as the court is looking at the various counts here, since they apparently run to 41, in the interest of brevity, I'll simply incorporate, with reference to the complaint, the remaining counts.

At paragraph 186, the plaintiff asks for a temporary restraining order requesting that this court

grant a temporary restraining order which would preserve the status quo and protect the rights and property of the plaintiff pending the resolution of this case, and allow the continuation of the payments of the Plaintiff/Debtor to the bankruptcy trustee as per the Chapter 13 plan.

Now, just as an aside here, before I continue with the substance of this order, whoever wants to respond to this on behalf of the defendants, is there any imminent danger of that status changing; what is your position with respect to his request that I enter an order restraining the bankruptcy court from taking any action that might result in foreclosure, is that what you're essentially asking me to do?

MR. FRY: Yes, I'm asking this court, this is a question that I asked of the bankruptcy judge concerning this restraining order, he said as long as there is no restraining order from this court, they can come in, First Investment or Alliance Mortgage, can come in and ask for a relief from stay and continue to ask for a relief from stay.

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THE COURT: I think I've answered my own question, you're asking me to issue an order restraining anybody from taking any action by way of foreclosure?

MR. FRY: Yes.

THE COURT: Regardless of what might occur in bankruptcy court?

MR. FRY: I'm asking that the status quo be retained in bankruptcy court without further requests for discontinuance of stay in that court. May I bring up one other point, sir?

THE COURT: Go ahead.

MR. FRY: In the first six counts related to HUD, I also asked as part of the relief that HUD further review all of the actions of the mortgage company related to everything that has been filed within the context of this

case, as well as all the actions of the mortgage company since 1991. And I've also asked that if it is found that there were discrepancies, that there were violations of law, that HUD assist the homeowner in prosecuting those violations. I can refer you to the specific paragraph which outlines that, if you look at paragraphs 31 and 32 on page 49.

THE COURT: All right. NOW, while he's getting that, I'll continue with the order. In the federal defendant's response to the plaintiff's motion for leave of court to file a first amended complaint, the argument is advanced that while

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leave to amend should be freely given, that the amendment would be futile such that it cannot cure the deficiency in the original complaint, then amendment is properly denied. Citing Jablonski v. Pan American. World Airways, Inc., 863 F.2d, 289 at 292, (3d. Cir. 1988). The federal defendants argue pursuant to 2401(a), that the action is time-barred in that every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.

With respect to the issue of when a cause of action accrues, the court in Wind River Min. Corp. v. United States, 946 F.2d 710 (9th Cir. 1991), the court held that a cause of action accrues upon the completion of the administrative proceedings. In other words, when the final administrative adjudication concerning the subject matter of the complaint is made.

The plaintiff contends, notwithstanding the fact that, as the court reads the complaint, the essence of the plaintiff's complaint is the refusal of HUD to accept an assignment of his mortgage in October of 1991. Plaintiff contends that his cause of action is not time-barred, relying on Ammcon Inc. v Kemp, 826 26 F.Supp. 639 (E.D. of NY, 1993). In that case the court had concluded

that the requirement that a suit be brought against the United States within six years after the right of action accrues did not bar a claim by a contractor
{pg 9}
against HUD seeking to recover under the contract to construct housing units. The court concluded that the action was not against the United States as such, but rather against HUD as an agency, as the contractor only sought funds within HUD's control.

In Portsmouth Redevelopment and Housing Authority v. Pierce, 706 F.2d 471, (4th Cir. 1983), the court reached the opposite conclusion, finding that an action against a federal agency or official will be treated as an action against the sovereign, if a judgment sought would expend itself on the public treasury or domain or interfere with the public administration or if the effect of judgment would be restrained to the government from acting or compelling it to act. The court concluded, more specifically to the point, that any monetary judgment recovered in the case would expend itself on the public treasury. There is no separate fund for payment of operating subsidies within HUD's exclusive control, the origin of which is not the public treasury.

The court went on to say at pages 473, the fund appropriated to HUD for payment of operating subsidies here originated in the public treasury and they do not cease to be public funds after they are appropriated.

The court notes that Carlyle Gardens v. Delaware State House Authority, 659 F.Supp. 1300, (District of Delaware, 1987), after an extensive analysis of this issue, the court
{pg 10}
concluded in that case that funds which originated in the public treasury but were put into a separate account at the Department of Housing and Urban Development would be appropriately retained in the nature as public

funds even after being appropriated so that a suit for those funds was one against the United States for purposes of sovereign immunity following the court's Portsmouth Redevelopment case. And declining to follow a number of other cases.

In the present case, for the reasons set forth in Carlyle, this court is inclined to follow that decision and the Portsmouth case. Moreover, in this case, it appears to the court that the primary remedy that is being sought against the federal defendant here, HUD, is in the nature of an injunction or direction or mandamus from this court to take certain action to undo previous decisions that have been made. So it does not appear that a money analysis is particularly on point. Even if it was on point, I would follow Carlyle; but the plaintiff appears to be seeking what I construe as essentially equitable relief.

The applicable statute of limitations, therefore, for civil actions against the United States under the APA, and the court views this an action under the APA, is six years. Pennsylvania v. U.S Department of Health and Human Services, 101 F.3d 939, (3d. Cir. 1996).

Having said that, the court is of the view,
{pg 11}
notwithstanding the excellently articulated position of this plaintiff, that the statute of limitations on the claim against the federal defendant here did in fact run as it accrued in October of 1991, no later than October of 1991, in conjunction with a review of the assignment.

Parenthetically, the plaintiff argues that the statute of limitations in this case should be tolled given an alleged disability that befell him between October of 1995 and February of 1996. Section 2401 provides in pertinent part that the action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases. The court views that language as

clearly requiring that the disability be present at the time that the cause of action accrues; and for that reason does not find that a tolling argument here is effective.

Insofar as the mortgage defendant is concerned, the mortgage defendant first argues that the capabilities of 28 U.S.C. Section 2401(a), specifically the six year statute of limitations. However, by its terms, the mortgage defendants are not subject to the statute of limitations under the APA. Whatever effect it would have on the federal defendant.

Consequently, the court looks to the appropriate analog in the statute for the statute of limitations. When the causes of action against the mortgage defendants be construed as tortious in that they supplied with respect to the alleged

{pg 12}

inaccurate supplying of information to HUD in conjunction with the assignment, refusal to accept the assignment or for a breach of contract based upon claims that they have failed to honor various commitments in various particulars. The court is of the opinion that those claims similarly under any construction would be time-barred.

Additionally and independently, the court finds insofar as the First Investment Company was concerned, that essentially the same core issues that form the subject matter of the plaintiff's complaint against them here were previously litigated up through the Superior Court level resulting in a decision adverse to Mr. Fry on April 17, 1997, at number 731 Pittsburgh 1996, appended to the defendant's brief.

The court finds, therefore, independently those issues having been adjudicated adversely between the same parties and there being an extent non-appeal final judgment on the merits, that it operates as res judicata insofar as this court is concerned.

For the foregoing reasons, therefore, the motion

to amend the plaintiff's complaint is denied. And the motions to dismiss the original complaint are granted.

And, finally, with respect to the request for a temporary retraining order, I think it's self-evident that since the case has been dismissed, that claim falls as well. But I simply wanted to make that clear.

All right that is the

{pg 13}

judgment of the court, we're adjourned.

(whereupon, at 11:25 a.m., the proceedings were concluded.)

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CERTIFICATE

I, Ronald J. Bench, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

s/ Ronald J. Bench — 8-19-99

Ronald J. Bench — Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WILLIAM L. FRY	:	
Plaintiff,	:	
	:	Civil Action
vs.	:	No. 98-236
	:	Erie
ANDREW M. CUOMO, Secretary of the Department of Housing and Urban Development, FIRST INVESTMENT COMPANY OF COLUMBUS, OHIO, an Ohio Corporation, ALLIANCE MORTGAGE COMPANY OF JACKSONVILLE, FLORIDA, a Florida Corporation,	:	
Defendants	:	

ORDER

AND, NOW, This 30th day of September, 1999, the Defendant having filed a Motion to Open the Order of Court of August 12, 199 [Doc. No. 43], at which time the Court on the record, after full argument, denied Plaintiff s Motion for leave of Court to File an Amended Complaint and dismissed Plaintiff s Complaint as untimely, and after consideration of the Federal Defendant's Memorandum of Law in opposition thereto, the Court finds no basis to modify its previous Order and the Motion is, therefore, DENIED.

s/ Sean J. McLaughlin
Sean J. McLaughlin
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WILLIAM L. FRY	:	
Plaintiff,	:	
	:	Civil Action
vs.	:	No. 98-236
	:	Erie
ANDREW M. CUOMO, Secretary of the Department of Housing and Urban Development, FIRST INVESTMENT COMPANY OF COLUMBUS, OHIO, an Ohio Corporation, ALLIANCE MORTGAGE COMPANY OF JACKSONVILLE, FLORIDA, a Florida Corporation,	:	
Defendants		

ORDER

AND, NOW, This 6th day of December, 1999, upon consideration of the Plaintiff s Motion to Open the Order of Court of September 30, 1999 [Doc. No. 53], IT IS ORDERED that the Motion BE AND HEREBY is DENIED.

s/ Sean J. McLaughlin
Sean J. McLaughlin
United States District Judge

FIRST INVESTMENT COMPANY	:	IN THE COURT OF COMMON PLEAS
vs.	:	OF ERIE COUNTY, PENNSYLVANIA
WILLIAM L. FRY and MARY ANN FRY, his wife	:	No. 5074 - 1993

ORDER

AND NOW, to-wit, this 20 day of March, 1996, upon consideration of the Motion for Summary Judgment and argument thereon, and upon review of the record which indicates that there are no genuine issues of material fact in dispute concerning servicing of the defendants' mortgage account by First Investment company, as well as the history of payment of the defendants' mortgage obligation which indicates that no payments have been made since March 4, 1993, notwithstanding the plaintiff's correct servicing of the account and it otherwise appearing that the plaintiff is entitled to judgment as a matter of law, it is hereby **ORDERED, ADJUDGED** and **DECREED** that the Motion for summary Judgment is **GRANTED.**

By the Court,

s/ John A. Bozza
John A. Bozza, President Judge

IN THE COURT OF COMMON PLEAS
OF ERIE COUNTY, PENNSYLVANIA

FIRST INVESTMENT COMPANY Plaintiff,	:	
	:	CIVIL DIVISION
vs.	:	
	:	No. 5074 - 1993
WILLIAM L. FRY and MARY.ANN FRY, his wife, Defendants	:	

MEMORANDUM OPINION

Bozza, John A. J.,

On November 30, 1995, Plaintiff, First Investment Company, filed a Motion for Summary Judgment which the Court granted. Procedurally, this case came before the Court once before in June of 1994 on Plaintiff's Motion for Summary Judgment. At that time, the Court denied Plaintiff's Motion in that there existed a genuine issue of material fact centering around whether the Plaintiff had properly serviced the Defendant's mortgage. Since that time, additional material has been submitted resolving that issue. The standard utilized by the Court in making its determination on both this and the prior Motion was whether there were any genuine issues of Material fact, and if not, was the moving party entitled to judgment as a matter of law. Cmwlth v. Riverview Leasing, Inc. 167 Pa.Commonwealth 32, 648 A.2d 580 (1994).

The facts of this case are reasonably straight

forward. The Plaintiff, First Investment Company loaned the Defendants money on August 25, 1982 in the form of a mortgage. The Defendants, Mr. and Mrs. Fry,. became obligated to repay this loan. The mortgage was insured under Section 235(I) of the National Housing Act, 12 U.S.C. §§l 701 et seq. Under this section, the United States Department of Housing and Urban Development, (hereinafter HUD) makes assistance payments to the mortgagee on behalf of the mortgagor. First Investment failed to properly calculate the payment due to them by HUD. This miscalculation was remedied. Despite this, Defendants failed to make any payments, whatsoever, on the mortgage. The mortgage provided for a foreclosure remedy in the event of a default by the Fry's, and since they defaulted, foreclosure was perceived to be the appropriate avenue for Plaintiff to follow.

Although the Defendants would couch the issue as they had in 1994 indicating that Defendants' failure to pay was the direct result of Plaintiff's miscalculation of the HUD subsidy, this is simply not the case. The issue now before the Court is whether the Defendants have met their obligation to the Plaintiff such that foreclosure would be inappropriate?[1]

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[1] When this Court issued its order denying Summary Judgment to the Plaintiff in 1994, it relied on Fleet Real Estate Funding v. Smith, 336 Pa.Super. 116, 530 A.2d 919 (1987), and its progeny, At that time, this line of case law was directly on point with the mortgage servicing issue. As mentioned in the body of this opinion, this Court was subsequently presented with enough evidence to indicate that the servicing of the Defendants' mortgage was no longer an issue. Thus, Fleet and those line of cases which followed Fleet are not applicable here.

As stated above, First Investment inaccurately calculated the amount to be subsidized by HUD for the Fry's loan. However, throughout the time from May 20, 1992, when the discrepancy was noticed, until the end of March, 1993, when the miscalculation was remedied, the Defendants failed to make any payment, whatsoever, to the Plaintiff on the mortgage. The law is clear that Mortgagors, such as the Fry's, are responsible for paying the full unsubsidized amount of their loan. HUD Handbook 4330.1, Administration of Insured Home Mortgages ¶¶10-7.A.2.n., 10-8.A, n..

Once the inaccurately calculated subsidy amount was recalculated in favor of the Defendants, offering Defendants the highest possible subsidy amount provided by HUD, the Defendants remained in default on unsubsidized portion of 'the loan. Because of Defendants' lack of monthly payments, arrearages accrued in the amount of $5,926.18. For almost a year, Mr. Fry, failed to set aside any money to cure the defeat. *See* Deposition Transcript of William L. Fry, May 31, 1995 at p. 22; Deposition transcript of Janet M Nelson, May 31, 1995 at p. 29. By his own admission, Mr, Fry acknowledged that had he set aside the unsubsidized portion of the monthly installment payments that would have fallen due between June 1, 1992 and March 1, 1993, he would have been able to pay that amount to the Plaintiff, thus bringing the amount current. *See* Fry Deposition at 29. Plaintiff cannot be held liable for Defendant's lack of prudence or foresight in budgeting. The fact remains that if any error or emission on the part of First Investment Company was remedied. Notwithstanding this, the Defendants have still failed to remit payment in accordance with the terms of the mortgage, thus the loan remains unsatisfied.

Since both parties agree that the unsubsidized

portion of the loan remains delinquent, there is no genuine issue of material fact. Therefore, the Plaintiff was entitled to judgment as a matter of law, and the Court hereby affirms its Order entered on March 20, 1996.

IN THE COURT OF COMMON PLEAS
OF ERIE COUNTY, PENNSYLVANIA

FIRST INVESTMENT COMPANY	:	
Plaintiff,	:	
	:	CIVIL DIVISION
vs.	:	
	:	No. 5074 - 1993
WILLIAM L. FRY and MARY ANN FRY, his wife,	:	
Defendants	:	

ORDER

And now to-wit this 22nd day of July, 1996, for the reasons set forth in the preceeding Memorandum Opinion, the Court hereby AFFIRMS its Order entered on March 20, 1996.

s/ John A. Bozza, Judge

FIRST INVESTMENT COMPANY	:	IN THE COURT OF COMMON PLEAS
	:	OF ERIE COUNTY,
v.	:	PENNSYLVANIA
	:	
WILLIAM L. FRY and MARY ANN FRY	:	CIVIL DIVISION
	:	
	:	No. 5074 - 1993

OPINION

November 8, 1993: This matter is before the Court on the Plaintiff's Preliminary Objections to the Defendants' Counterclaim. We will grant the objection.

On August 25, 1982, the parties entered into a Housing and Urban Development (HUD) sponsored mortgage in the amount of $55,000.00 for a residence located at 1113 Garloch Drive. The mortgage was filed on August 26, 1982 and is recorded in the Office of the Recorder of Deeds of Erie County in Mortgage Book Volume 1331, Page 318.

Beginning in March of 1992, the Frys received a HUD subsidy of $392.00 resulting in a monthly payment due from them in the amount of $503.30. In July of 1992, the Frys were advised by First Investment that the HUD subsidy would be reduced to $81.49 for the June 1992 payment retroactive to October of 1991. This recalculation resulting in an increase in the Fry's monthly payment obligation by $310.51 per month. The Frys aver that First Investment improperly calculated this amount and that they attempted to have First Investment review the subsidy but were unsuccessful. The Frys ceased making any payment on the mortgage

in July of 1992.

On March 11, 1993, First Investment accepted a HUD recalculation of the mortgage payment and requested payment of the arrearages from July of 1992 of $5,967.85. Upon the failure of the Frys to pay this amount, the present mortgage foreclosure action was filed. First Investment seeks judgment in the amount of $67,033.12 which amount includes $53,019.32 in unpaid principal, plus interest, late charges, attorneys' fees and escrow deficit charges.

The Frys filed a pro se Answer, including New Matter and Counterclaim, denying that the mortgage is in default and averring that First Investment's calculation of payment was not in accordance with the terms of the mortgage and HUD regulations. The Frys claim money damages for "financial and emotional hardship" and seek reinstatement of the mortgage with all charges and arrearages deleted.

We note that at both oral arguments and in his brief in opposition to the preliminary objections, counsel for the Frys withdrew the claim for "emotional distress" damages.

First Investment filed the present Preliminary Objection seeking dismissal of the Frys' Counterclaim on the basis that Pennsylvania Rule of Civil Procedure Rule 1148 prohibits such a counterclaim in mortgage foreclosure actions. We agree.

Counterclaims in mortgage foreclosure actions are governed by the terms of Pa.R.C.P. 1148 which provides:

A defendant may plead a counterclaim which

arises from the same transaction or occurrence or series of transactions from which the plaintiff's cause of action arose.

This rule is to be interpreted narrowly, and only those counterclaims which are part of or incident to the creation of the mortgage itself are permitted. Mellon Bank N.A. v. Joseph, 267 Pa.Super. 307, 406 A.2d 1055 (1979); See also Federal Land Bank of Baltimore v. Fetner, 269 Pa.Super. 455, 410 A.2d 344, cert. den. 446 U.S. 918, 100 S.Ct. 1853, 64 L.Ed.2d 273 (1979). Compare Meritor Savings Bank V. Barone 399 Pa.Super. 213, 582 A.2d 21 (1990).

We find that the Frys' counterclaim asserting that First Investment mishandled the mortgage servicing and "thrust them into default" did not arise from the creation of the mortgage itself and should not be permitted.

Accordingly, First Investment's preliminary objections are granted and the Frys' counterclaim is dismissed.

November 8, 1993

s/ Roger M. Fischer, Judge

FIRST INVESTMENT COMPANY	:	IN THE COURT OF COMMON PLEAS OF ERIE COUNTY, PENNSYLVANIA
v.	:	
WILLIAM L. FRY and MARY ANN FRY	:	CIVIL DIVISION
	:	No. 5074 - 1993

ORDER

November 8, 1993: For the reasons set forth in the accompanying Opinion, the Plaintiff's Preliminary Objection to the Defendants' Counterclaim is GRANTED.

The Defendants' Counterclaim is hereby DISMISSED.

s/ Roger M. Fischer, Judge

THE SUPERIOR COURT OF PENNSYLVANIA
PITTSBURGH DISTRICT

FIRST INVESTMENT COMPANY	:	
Appellee	:	
	:	No. 00731
v.	:	PITTSBURGH 1996
	:	
WILLIAM L. FRY and MARY ANN FRY, his wife	:	
Appellant	:	

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Erie County be, and the same is hereby affirmed.

BY THE COURT:
s/ Eleanor R. Valecko
DEPUTY
PROTHONOTARY

Dated: April 17, 1997

FIRST INVESTMENT COMPANY Appellee	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
WILLIAM L. FRY and MARY ANN FRY, his wife Appellant	:	No. 00731 Pittsburgh 1996

Appeal from the ORDER entered March 20, 1996 in the Court of Common Pleas of Erie County, Civil, No. 5074-1993

BEFORE: FORD ELLIOTT, J., SCHILLER, J., BROSKY, J.

MEMORANDUM:

FILED: APRIL 17, 1997

Appellants, William L. Fry and Mary Ann Fry (hereinafter "the Frys"), appeal from the entry of summary judgment on March 20, 1996 in the Court of Common Pleas of Erie County. We affirm.

FACTS:

On August 25, 1982, appellee, First Investment Company, and appellants entered into a mortgage loan agreement for $55,000for the purchase of a residence in Erie, Pennsylvania. The loan was insured under Section 235(I) of the National Housing Act, 12 U.S.C. §1701 et seq., an Act which established a program subsidizing monthly mortgage payments for eligible beneficiaries; the program was administered by the U.S. Department

of Housing and Urban Development (HUD). Eligibility is set by HUD guidelines and is determined through annual recertification, a process requiring the mortgagee to obtain information on income, employment, family composition, and occupancy from the mortgagor. The mortgagee verifies the income information and computes the subsidy according to HUD formulae. When information cannot be reconciled, HUD establishes the amount of income to be used as the basis for assistance.

In October 1991, appellants were in default on their mortgage loan. At that time, HUD considered, but denied assignment of the mortgage.[1] However, with the assistance of staff from a HUD certified counseling agency, a forbearance agreement was executed between the Frys and First Investment. By May 15, 1992, the account was current.

On May 20, 1992, appellee found that the October 1991 recertification forms had not been submitted and so informed appellant. On June 5, 1992, when recertification was completed, appellee determined that HUD was owed $3,076.08 as a return of excess subsidy, and that the unsubsidized portion of the loan payment should be increased from $503.30 to $812.70. Appellant disputed this calculation, and appellee submitted the dispute to HUD for resolution. On September 10, 1992, HUD verified the subsidy calculation as computed by appellee. No payments

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[1] HUD gave two reasons for not accepting assignment of the mortgage: "Your stated reason for default (financial problems within your business) is a risk of the trade and is not a circumstance beyond your control for assignment of mortgage consideration." In addition "Insufficient documentation was provided to support your ability and intention. to pay HUD if accepted in the assignment program."

were received from appellants during or after the dispute. On November 20, 1992, appellee referred the account for foreclosure.

The Frys again sought assistance from the HUD-certified counseling agency. In December 1992, the agency submitted new information on income and occupancy to HUD. On March 4, 1993, HUD reinstated the original subsidy level, the highest available under Section 235, retroactive to October 1991. Despite the grant of relief, no payments were made by appellants. On April 7, 1993, appellee mailed appellants a Notice of Intention to Foreclose Mortgage and Accelerate Loan Balance. A Complaint in Mortgage Foreclosure was filed May 28, 1993.

On July 15, 1993, appellants acting pro se filed an Answer, New Matter and Counterclaim, arguing that appellee had failed to service the mortgage in accordance with federal regulations. The Counterclaim was dismissed upon appellee's preliminary objections. On June 17, 1994, appellee filed a motion for summary judgment. The motion was denied on September 16, 1994, "in light of the material facts in dispute regarding whether this mortgage was serviced correctly...."

On November 30, 1995, appellee filed a second motion for summary judgment. In support, appellee filed depositions of appellant William L. Fry, his accountant, the employee of the HUD-certified counseling agency who had assisted the appellants, and business records encompassing the loan payment history through November 21, 1995. Appellants filed three affidavits in opposition from the same individuals. Appellee's motion was granted on March 20, 1996. This appeal followed.

DISCUSSION:

Although appellants identify three issues, they are, in essence, subsumed in one question: whether the

trial court erred in failing to consider material facts related to appellee's servicing of the mortgage, thereby precluding improper servicing of the account as an equitable defense.[2]

Our well-established standard in reviewing the grant of summary judgment is as follows:

> On review of an order granting summary judgment, we must determine whether the moving party has established that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. In making this determination, we must examine the record in the light most favorable to the nonmoving party, who is entitled to the benefit of all reasonable inferences. All doubts as to the existence of a factual dispute must be resolved in favor of the non-moving party and the entry of summary judgment is appropriate only in the clearest of cases.

Brooks v. Sagovia, 431 Pa.Super. 508, 511, 636 A.2d 1201, 1202 (1994) (citations omitted.)

Appellants argue that genuine issues of material fact related to appellees, servicing of their federally insured mortgage remain unresolved and give rise to an

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[2] Buried in appellants, Reply Brief is a reference that appellee did not comply with HUD notice requirements prior to instituting the mortgage foreclosure action. Since this issue was neither raised as a question complained of on appeal nor argued in their brief, we need not address it.

equitable defense to foreclosure.[3] Two contentions are central to their argument: first, that appellee's error in calculating their HUD subsidy caused their mortgage payments to rise to an unaffordable level and created a false arrearage; and second, that when it became apparent that appellee was not prepared to acknowledge or correct its mistakes, appellants used the funds they had set aside to pay the mortgage to pay other expenses. Additionally appellants argue that under Fleet Real Estate Funding Corp. v. Smith, 366 Pa.Super. 116, 530 A.2d 919 (1987), the evidence of appellee's failure to service the loan in violation of HUD regulations constitutes a defense to the foreclosure action.

Appellee counters that HUD's decision in March 1993, reinstating appellants full subsidy, retroactive to October 1991, not only rectified any potential errors that appellees might have made in servicing the mortgage but also removed that issue, and any defenses to it, from contention.[4] In light of that argument, appellees posit that the only remaining issue is the cause of the default which they assert to be the appellants' own actions in failing to pay the unsubsidized portion of the mortgage since June 1992.

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[3] Appellants acknowledge that the mortgage loan was delinquent and that they have taken no steps to cure the delinquency.

[4] Appellees thus assert that Fleet and its progeny do not apply to this case. They nevertheless point out that if Fleet, which applies to forbearance provisions, were extended to Section 235 mortgages, appellants in invoking an equitable remedy would themselves be charged with a duty to behave equitably in their dealings with appellees. In light of appellants' failure to maintain funds to pay the undisputed unsubsidized portion of the mortgage in escrow, the defense would not be viable.

Although a mortgage foreclosure action is an action at law, see Pa.R.C.P. 1141, equitable relief is available if it can be granted consistently with principles of law. Fleet Real Estate Funding Corp. v. Smith, supra at 124 n.3, 530 A. 2d at 923 n.3 (1987) Such a remedy has been found applicable when a mortgagee fails to service a federally insured mortgage in accordance with applicable HUD forbearance regulations, id., or applicable Veterans Administration foreclosure provisions, Union National Bank v. Cobbs, 389 Pa.Super. 509, 517-518, 567 A.2d 719, 723-724 (1989). However, in the absence of an argument for equitable relief, summary judgment is properly granted in a foreclosure action where the mortgagor admits that he is delinquent in mortgage payments. First Wisconsin Trust Company v. Strausser, 439 Pa.Super. 192, 204, 653 A.2d 688, 694 (1995).

After careful review of the record, we must agree with the court below which found that:

> although the Defendants would couch the issue as they had in 1994 indicating that... failure to pay was the direct result of Plaintiff's miscalculation of the HUD subsidy, this is simply not the case. The issue now before the Court is whether the [appellants] have met their obligation to the [appellee] such that foreclosure would be inappropriate?

As the court found, the servicing issue, controverted facts surrounding the issue, and equitable remedies triggered by the issue, were no longer relevant once HUD's March 1993 decision in favor of appellants

remedied any errors or omissions.[5] Furthermore, we find unavailing appellants' assertion that because of appellee's conduct they gave up setting aside funds for the unsubsidized portion of the mortgage and were unable to pay that amount when the HUD decision was rendered. Appellants own actions belie that contention. Appellants clearly sought assistance from the HUD counseling agency, assistance that within nine months successfully resolved the issue. During that same time period, they just as clearly chose not to set aside the minimum unsubsidized portion of the mortgage to which they were legally obligated. As Mr. Fry acknowledged, if the money had been set aside, it could have been paid to First Investment in March of 1993 when the recertification/subsidy issue was resolved. Deposition of William L. Fry, May 31, 1995.

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[5] The court below wrote:

> When this Court issued its order denying Summary Judgment .. in 1994, it relied on Fleet Real Estate Funding v. Smith, 336 Pa. Super. 116, 530 A. 2d 919 (1987), and its progeny. At that time, this line of case law was directly on point with the mortgage servicing issue. ... this Court was subsequently presented with enough evidence to indicate that the servicing of the Defendants, mortgage was no longer an issue.

First Investment Company v. William L. Fry and Mary Ann Fry, his wife, No. 5074 - 1993, March 20, 1996.

CONCLUSION:

The trial court correctly held that the equitable defense of failure to properly service the federally issued mortgage was not available to appellants. Thus, there were no material issues of fact on this record and summary judgment was properly entered.

Consequently, we affirm the judgment of the Court of Common Pleas of Erie County.

IN THE COURT OF COMMON PLEAS
OF ERIE COUNTY, PENNSYLVANIA
CIVIL DIVISION

FIRST INVESTMENT COMPANY,	:	
Plaintiff	:	
	:	
vs.	:	No.: 5074 - 1993
	:	
WILLIAM L. FRY and MARY ANN FRY, his wife,	:	
Defendants	:	

NOTICE OF ORDER, DECREE OR JUDGMENT

TO: DEFENDANTS

You are hereby notified that a judgment was entered in the above-captioned proceeding on the 9th day of June, 1997.

Judgment is as follows: $108,547.24

s/ Patrick L. Fitzner
Deputy

(Letterhead) (Crest)

THE SUPERIOR COURT OF PENNSYLVANIA
OFFICE OF THE PROTHONOTARY
1018 GRANT BUILDING
PITTSBURGH, PENNSYLVANIA 15219

DAVID A. SZEWCZAK, ESQUIRE
PROTHONOTARY

(412) 865-7602

ELEANORE R. VALECKO
DEPUTY PROTHONOTARY

July 16, 1997

James E. Blackwood, Esquire
23 West 10th Street
Third Floor
Erie, PA 16501

In Re: First Investment Company vs. William L. Fry, et ux
No. 731 Pittsburgh 1996

Dear Mr. Blackwood:

The Court has entered the following Order on the Petition for extraordinary Relief in the above-captioned matter:

"ORDER OF COURT

AND NOW, this sixteenth day of July, 1997, Appellant's Petition for Extraordinary Relief DENIED.

Date: July 16, 1997

PER CURIAM"

Very truly yours,
s/ Eleanor R. Valecko
DEPUTY PROTHONOTARY

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

WILLIAM L. FRY and	:	No. 0090 W.D.
MARY ANN FRY,	:	Miscellaneous Docket
PETITIONERS	:	1997
V.	:	
	:	
FIRST INVESTMENT	:	
COMPANY,	:	
RESPONDENT	:	

ORDER

AND NOW, this 8th day of January, 1998, it appearing that Petitioner having filed a Voluntary Petition for Bankruptcy at No. 97-11219, United States Bankruptcy Court, Western District of Pennsylvania, it is hereby ordered that the within action is stayed pursuant to the automatic stay provisions of the U. S. Bankruptcy Code, 11 U.C.S. § 362.

By: (initials) I.O.H.
Prothonotary

(SEAL)
A True Copy Amy J. Ceruso, Esquire
as of: Jan 8, 1998
Attest: s/ Amy J. Ceruso
Deputy Prothonotary
Supreme Court of Pennsylvania

IN THE SUPREME COURT OF PENNSYLVANIA
Western District

WILLIAM L. FRY and	:	No. 0090 W.D. Misc.
MARY ANN FRY,	:	Dkt. 1997
Petitioners	:	
V.	:	
	:	
FIRST INVESTMENT	:	
COMPANY	:	

ORDER

PER CURIAM:

AND NOW, this 4th day of May, 1998, the request for removal of stay and reinstatement of proceedings is granted and the Application for Leave to Appeal Nunc Pro Tunc and the Petition for Extraordinary Relief are denied.

(SEAL)
A True Copy Patricia Honard
as of: May 4, 1998
Attest: s/ Patricia Honard
Chief Clerk
Supreme Court of Pennsylvania

IN THE SUPREME COURT OF PENNSYLVANIA
Western District

WILLIAM L. FRY and	:	No. 0090 W.D. Misc.
MARY ANN FRY,	:	Dkt. 1997
Petitioners	:	
V.	:	
	:	
FIRST INVESTMENT	:	
COMPANY	:	

ORDER

PER CURIAM:

AND NOW, this 5th day of August, 1998, the Petition for Reconsideration is denied.

(SEAL)
A True Copy Patricia Honard
as of: August 5, 1998
Attest: s/ Patricia Honard
Chief Clerk
Supreme Court of Pennsylvania

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case No. 99-3985

William L. Fry,
Appellant

vs.

ANDREW M. CUOMO, Secretary of
the Department of Housing
and Urban Development

THE FIRST INVESTMENT COMPANY
OF COLUMBUS OHIO,
an Ohio Corporation

ALLIANCE MORTGAGE COMPANY
OF JACKSONVILLE, FLORIDA,
a Florida Corporation

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA
CASE NO. 98-CV-236E

PETITION OF PLAINTIFF-APPELLANT FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

Filed Pro Se by the Appellant:
William L. Fry
1113 Garloch Drive
Erie, PA 16505
814-833-6709

AFFIDAVIT OF APPELLANT

I am William L. Fry, the Pro Se Appellant/Plaintiff in this matter, and do state as follows:

1. I certify that the statements made in this PETITION OF PLAINTIFF-APPELLANT FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC are true and correct to the best of my knowledge and belief.

2. I understand the definition of perjury and that any false statements herein would be subject to the penalties relating to false testimony in a Court of Law.

This Affidavit is respectfully submitted by William L. Fry, Pro Se, the Appellant/Plaintiff in this matter.

s/ William L. Fry
William L. Fry

SWORN TO and subscribed before me this 5th day of November 2000.

(Signed and sealed)
Notary Public

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STATEMENT OF THE PRO SE PLAINTIFF-APPELLANT

I express belief, based upon my knowledge of and participation in the matters represented herein and limited understanding of law:

1. That this Appeal involves a question of exceptional importance as to the application of the Full Faith and Credit Clause to a State Court proceeding wherein the present Appellant was unrepresented due to private appellate counsel not being present due to having suffered cardiac arrest.

2. This issue has never been addressed by the Circuits and appears to be a case of first impression.

3. The issues which necessarily follow i.e., estoppel and statute of limitations and recent precedents and correction of error and overlooked issues makes this appeal rehearing of exceptional importance.

STATEMENT OF CASE

This petition for rehearing and suggestion for in banc review rises from Appellant's belief that the Court in its opinion has mistakenly adopted incorrect facts and history of the case and, further, has made numerous errors in its analysis of said facts. Specifically, Appellant wishes the rehearing panel to review the corrections of error, address the issue of Full Faith and Credit, to reexamine its decision of the statute of limitations issue and to address the overlooked issue of equitable tolling in the light of the material presented in the following pages.

{pg 2}

I. CORRECTION OF ERROR - INCORRECT HISTORY AND FACTS: The Court's OPINION is factually and historically incorrect. The Appellant respectfully submits that the entire portion of the OPINION intending to state the history and many of the relevant facts of this matter, starting on page 3 with "After Fry's request..." through the end of the same paragraph on page 4, by depending upon the words of Defendant First Investment (and copied in many parts by the Federal Defendant), is a gross misstatement of the events of 1991 through the denial by the Pennsylvania Supreme Court in 1997 and a white-washed concealment of the improper and unlawful actions of First Investment. The actual history, to the best of the Appellant's knowledge and supported by over 400 pages of affidavits and other documentation that were submitted to HUD by Congressman English and Senator Specter and intended as supporting documents to Appellant's Second Amended Complaint, is outlined in the **BRIEF OF APPELLANT** in the "STATEMENT OF CASE" (pages 12-14), "STATEMENT OF FACTS" (page 15) and presented in specific detail in the **REPLY BRIEF OF APPELLANT AS TO BRIEF OF APPELLEES FIRST INVESTMENT AND ALLIANCE MORTGAGE** (pages 2-21) as the "REPLY TO THE FIRST INVESTMENT AND ALLIANCE MORTGAGE 'COUNTER STATEMENT OF THE CASE' AND 'COUNTER STATEMENT OF THE FACTS'".

A mistake has been made by the Court as it appears that incorrect facts and history were accepted as true by the Court and were stated as true in the OPINION of the Court, it appears that the Court's OPINION and findings of fact have been prejudiced by said relied-upon incorrect facts and history, and as such are of questionable merit, and are therefore appealable,

as are the
{pg 3}
findings of HUD and the prejudiced actions of HUD in accepting and continuing to accept incomplete, inaccurate and/or fraudulent information for a period of nine years from Defendant First Investment and for three years from Defendant Alliance Mortgage.

II. CORRECTION OF ERROR - STANDING OF DEFENDANT ALLIANCE MORTGAGE: On page 2 of the Court's OPINION it is erroneously stated that "... Appellee Alliance Mortgage Company is the successor in interest to First Investment.". Appellant respectfully submits that Alliance Mortgage Company is in fact the servicing agent of First Investment and became such per notice of August 4, 1997. The significance of this is that Appellant should have been afforded the opportunity to have an Amended Complaint directed against Alliance as a matter of right. Further, Alliance Mortgage Company can not be protected by Res Judicata or Full Faith and Credit or the applicable statute of limitations as it was not a party to the State Court proceedings. Any actions undertaken by said Alliance Mortgage Company would therefore subject them to possible liability for failing to undertake a proper review of Appellant's account and report violations of servicing and pre-foreclosure review documents of First Investment as mandated by applicable Federal Regulations, their not forcing the withdrawal of an illegal foreclosure action and/or their making possible false reporting to HUD and/or their making false claims in multiple courts and perpetuating the improper servicing and other unlawful acts of First Investment. Per **HUD Handbook 4330.1, "Administration of Insured Home Mortgages"**, 6-10C.2.:
{pg 4}
"If the servicer is HUD approved, HUD will hold

the mortgage servicer equally responsible with the holding company".

Therefore, Appellant respectfully represents that dismissing the action as to Alliance Mortgage Company was improper. (**BRIEF OF APPELLANT**: 37; Ap.I: 192, 221-223, 273-281).

III. CORRECTION OF ERROR - HUD'S RELIANCE ON INFORMATION: On page 8 of the Court's OPINION it is stated that "... The denial [of Appellant's assignment request] was based entirely on information provided by [Appellant] Fry and was therefore unrelated to any misinformation by the mortgage companies.". Appellant respectfully submits that the foregoing statement is mostly incorrect as HUD was mandated by applicable Federal Regulations to review pre-foreclosure documentation and the Assignment Information Package submitted by First Investment and accord significant weight to the same and the specific reasoning of First Investment not recommending the Appellant for assignment. Appellant respectfully submits that the information submitted by First Investment as mandated by **HUD Manual 4330.2 "Mortgage Assignment Processing and Secretary-Held Servicing"** (Chapters 3-5 Lender Initial Processing Requirements, 3-6 Lender Evaluation of Case, 3-7 Lender Assignment Decision, 9-1 Returning Cases to Mortgagees for Additional Servicing, 10-1 Importance of accurate records: "The file MUST reflect not only WHAT has happened, but also WHY and WHEN it happened.") and used by HUD in determining Appellant's eligibility for the mortgage assignment program was false and/or incomplete and served to prejudice HUD's decision-making process to Appellant's

{pg 5}

detriment. See **24 CFR § 203.502 Responsibility for**

Servicing, 24 CFR § 203.606 Pre-foreclosure review (Ap.I 297), also see: **EXHIBIT: HUD MORTGAGEE LETTER 89-18: Pre-Foreclosure Reviews and Mortgage Servicing,** (Ap.I 364-367), and per **HUD Manual 4330.1** 8-7 E.1.b. (Ap.I 338):

> "Of particular interest are the lenders comments as to whether (1) the default was caused by circumstances beyond the mortgagors control, and (2) there is a reasonable prospect that the mortgagor will be able to resume full mortgage payments within 3 years and be able to pay the mortgage in full by its maturity date." (underline added)

As can be seen from the requirements above, the evaluation and primary decisions concerning eligibility were made by the mortgagee prior to being presented to HUD and have definite prejudicial effect on any review or decision by HUD. As preliminary determination was based upon the decision of First Investment and then the information was submitted to HUD prior to the mortgagor providing any information, and submitted information appears to have been fraudulent both in context and in content, the assignment request was tainted prior to the submission of any information by the mortgagor. And, specifically, "... of particular interest are the lenders comments ...". **The above underlined comments (1) and (2) are the specific and only reasons that HUD used in its denial of the Assignment Request. (REPLY BRIEF OF APPELLANT AS TO BRIEF OF THE FEDERAL APPELLEE,** pages 10-11)

IV. CORRECTION OF ERROR - NO PROCEDURE FOR AGENCY REVIEW and STATUTE OF LIMITATIONS MAY BE INAPPLICABLE: On page 9 of the

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Court's OPINION it is erroneously stated that "Here, because no procedures exist for agency review of the denial of an assignment request, the date of accrual for [Appellant] Fry's cause of action was the date of HUD's final decision." Per **HUD Manual 4330.1** 8-7 E.3. (Ap.I 339):

> "In the event the local HUD Office makes the decision to reopen an assignment case for "good cause," mortgagees must comply with HUD's request to delay foreclosure."

As evidenced in the manual, procedures have existed for agency review of an assignment, and even a local HUD Office had the capability to reopen an assignment for "good cause" and to accept additional information. (See **REPLY BRIEF OF APPELLANT AS TO BRIEF OF THE FEDERAL APPELLEE**, pages 11-12). Information that was not available at the time of the assignment determination was forwarded to HUD in November 1991 by the HUD Counseling Agent, the Appellant, his accountant and his former employer. This information was accepted by HUD and not returned or rejected, therefore, the assignment process must be considered to have been reopened. As the information was not returned or rejected, and no further determination having been made, the assignment review must be considered as still on-going. As there were procedures for additional review, the six year statute of limitations as to 28 U.S.C. § 2401(a) may not apply but may qualify under 28 U.S.C. § 2401(b) see Reo v. United States Postal Service, 96 F.3d 73 (C.A. 3 NJ. 1996) which states while quoting Pascale v. United States, 998 F.2d 186, 192-93 (3rd Cir. 1993):

> "If the agency does not formally deny the claim,

> and has not finally disposed of the claim within six months after it was filed, 'the claimant may wait indefinitely before filing
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> suit'."

Thus, for the Appellant, the limitations has not begun to run.

V. STATUTE OF LIMITATIONS MAY BE INAPPLICABLE: The Appellant respectfully submits that any applicable statute of limitations may be inapplicable or have not begun to run for all Defendants, as Appellant's as well as Congressional inquiries were received by HUD and by other federal departments. Complaint information, documents and affidavits were submitted to and accepted by HUD in 1992, 1993, 1995 and 1998. The acceptance of complaint information, etc., and promises of review gave the Appellant the belief that the requested Agency review had actually been undertaken or that submission of his allegations had been made to the Mortgage Review Board or to an Administrative Law Judge, two separate Courts within the Agency. As these complaints have never been determined and are still outstanding, the statute of limitations has not begun to run as to HUD or any Defendant. (see citations to Reo v. United States Postal Service and Pascale v. United States above).

Complaint documents were presented to and received by HUD:

> December 22, 1992, Mr. John Oswald, HUD, Pittsburgh, Pennsylvania, 84 pages, not returned or rejected, calculation error corrected on March 4, 1993, but servicing issues not addressed.

October 8, 1993, Department of HUD, Columbus, Ohio, approximately 35 pages, copy to Mr. Mark Watkins, HUD, Pittsburgh, not returned or rejected.

July 26, 1995, Mr. Mark Watkins, HUD, Pittsburgh, Pennsylvania, approximately 200 pages, not returned or rejected.

September 25, 1998, Mr. Joseph McCloskey, HUD, Washington, approximately 400 pages, presented by Congressman English and

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Senator Spector, HUD refused to review on July 27, 1999 "... until this lawsuit is either dismissed or ruled on by the Federal Court."

Between 1992 and 1998 over 50 inquiries were made to HUD and other Agencies by the Appellant, the local HUD Counseling Agent, Congressman English and Senator Spector requesting the proper avenue by which a formal complaint could be presented to HUD.

24 CFR 17 TITLE 24--HOUSING AND URBAN DEVELOPMENT, PART 17--ADMINISTRATIVE CLAIMS, § 17.2 WHEN PRESENTED:

" (a) For purposes of this subpart, a claim shall be deemed to have been presented when the Department receives ... or other written notification of an incident ... A claim which should have been presented to the Department, but which was mistakenly addressed to or filed with another Federal agency, is deemed to be presented to the Department as of the date that the claim is received by that Department. If a claim is mistakenly addressed to or filed with the Department, the Department shall forthwith

transfer it to the appropriate Federal agency, if ascertainable, or return it to the claimant."

Or, in the alternative, Appellant respectfully submits that the limitations period set forth in 28 U.S.C. § 2401 as to HUD or any limitations periods for First Investment and Alliance Mortgage should have been tolled upon the receipt of his complaints as submitted to HUD in 1992, 1993, 1995 and 1998, each extending the statute of limitations as said complaints were submitted and accepted by HUD as an Agency that has within its structure its own Court Systems, i.e., the Mortgage Review Board and Administrative Law Judges, each with the authority to transfer cases to the Department of Justice, Claims Court or to a District Court.

VI. MISINTERPRETED CASE LAW: The appellant respectfully submits that the Circuit Court has misconstrued the rationale of Ammcon, Inc. v. Kemp, 826 F.Supp. 639 (E.D.N.Y. 1993) in light of the fact
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that any funds paid by HUD would not be public funds but, rather, funds are available from sources other than public funds, such as insurance premiums, interest on premiums, approved lender fees, civil money penalties and judgments. Also see **BRIEF OF APPELLANT**, pages 27-30, with references to the record and Oral Argument.

HUD Directive Number: GHH-0003: Title I Claim--Suit Against U.S., October 18, 1991: "... It was assumed that this settlement would be paid by the Department of Justice from the permanent indefinite appropriation for judgments and settlements authorized by 31 U.S.C. 1304. The General Accounting Office (GAO), however, has refused to approve payment of the judgment

from the aforesaid appropriation. GAO said that this settlement should be paid from the General Insurance Fund, citing Comptroller General Opinion B-202083, 62 Comp. Gen. 12 (1982). That decision held that 1304 (then 31 U.S.C. 724a) was not available for payments for a compromise settlement (S.S. Silberblatt, Inc. V. East Harlem Pilot Block) and a judgment (Bronson and Popoli, Inc. v. Enoch Star Restoration Housing Development Fund) when another source for the payment is available; that the appropriate FHA insurance funds constituted such other source; and therefore the payments in question were to be made from the FHA funds."

HUD has argued that this action is an action against the United States and that any judgment would be against the Public Treasury, however, in the case cited below from the Court of Appeals for the District of Columbia Circuit, HUD has chosen to argue (for the benefit of HUD) exactly the opposite stance as in this Court.

DRG FUNDING CORPORATION V. SECRETARY OF HOUSING AND URBAN DEVELOPMENT, 76 f.3D 1212 (D.C. Cir, 1996): "... HUD argues, however, that § 3728 is inapplicable because DRG's judgment against HUD is not a "judgment against the United States Government presented to the Comptroller General," the terms triggering § 3728. HUD is an agency that may "sue and be sued," under 12 U.S.C. § 1702, and has an independent revolving fund for the payment of judgments. So the Comptroller General is simply not involved in payment of DRG's judgment.

> So far as appears (and DRG has the burden of showing that it is within the terms of the statute), HUD is correct. Although
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> one statute states that "except as provided by the Contract Disputes Act of 1978, payment of final judgments rendered by a district court ... against the United States shall be made on settlements by the General Accounting Office," 28 U.S.C. § 2414, which the Comptroller General heads, 31 U.S.C. § 702(b), in practice the GAO's involvement is narrower. 31 U.S.C. § 1304(a) creates the judgment fund out of which payments certified by the Comptroller General are paid, but the judgment fund is used only if "payment is not otherwise provided for." Id. § 1304(a)(1). According to a GAO publication, where a sue-and-be-sued agency conducts a business-type program funded by a revolving or special fund, judgments arising from the program are payable by the agency from the fund. U.S. General Accounting Office, Office of the General Counsel, Principles of Federal Appropriations Law (2d ed. 1994), 14-38. Here the parties agree that DRG's judgment would--at least nominally--be paid from HUD's General Insurance Fund, thereby short-circuiting the Comptroller General."

As monies such as Civil Money Penalties and judgments (as directed by the GAO into the General Insurance Fund) as well as from premiums, fees, etc., there are funds available to satisfy a possible judgment, or, judgment could be limited to only those specific funds derived from penalties and/or judgments. Therefore, this action is a suit against HUD in its role as an Agency doing business in the common market place, which eliminates that statute of limitations.

VII. LIMITED DISCOVERY: The appellant respectfully submits that the courts have the authority to remand this case for the purpose of allowing the appellant the opportunity to initiate limited discovery in an attempt to substantiate his allegations of fraud before having his complaint dismissed. Appellant respectfully submits that had he been afforded the opportunity of a form of discovery, it is likely that his allegations regarding fraud by First Investment, Alliance Mortgage Company as well as by HUD would
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have been proven to be of merit and, thus, the statute of limitations defense would not stand the test of fraudulent conduct.

VIII. ISSUE NOT ADDRESSED - EQUITABLE TOLLING: Appellant respectfully submits that the Circuit Court failed to address the defense of "Equitable Tolling" as set forth in Appellant's Briefs and specifically how it relates to all Defendants. See Oshiver vs. Levin, et al, 38 F.3d 1380 (C.A. 3 Pa. 1994), **REPLY BRIEF OF APPELLANT AS TO BRIEF OF FEDERAL DEFENDANT**, pages 27-30), **REPLY BRIEF OF APPELLANT AS TO BRIEF OF APPELLEES FIRST INVESTMENT AND ALLIANCE MORTGAGE**, pages 27-30)

IX. MISINTERPRETATION OF EVENTS AS TO CONTINUING WRONG AND FRAUDULENT CONCEALMENT: Appellant respectfully submits that the Court overlooked and/or misinterpreted the facts as presented in his briefs that there were three foreclosure actions (1991, 1992 and 1993). In each instance, there were no mandated face-to-face meetings (**24 CFR 203.606**), there were unresolved servicing problems and apparently fraudulent reporting to HUD. The 1993 foreclosure also was missing a mandated HUD 3

LETTER (**HUD Handbook 4330.1**, 8-7C3). Each foreclosure was unlawfully initiated per HUD Regulations and Code of Federal Regulations. These violations were concealed and fraudulent reports were made to HUD in violation of civil and criminal law. HUD is mandated by Congress to enforce the regulations and law as to the actions of both the mortgagees and mortgagors with Civil Penalties and Criminal Prosecution. HUD is not immune and can not wave the mandate of Congress and the letter
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of the law. As to each Defendant, there are three almost identical violations of law and concealment. Each is an act within a continuing wrong. The last was April 7, 1993, within the six year statute of limitations. The last act is not complete, as the state court foreclosure action, initiated with unlawful acts, is still active in the state court pending the completion of foreclosure, upon which, a fraudulently based claim would be made with HUD.

X. ISSUE NOT BARRED BY RES JUDICATA OR FULL FAITH AND CREDIT - NOT ON MERITS WHEN ABANDONED BY COUNSEL DUE TO CARDIAC ARREST: Appellant respectfully submits that in addition to the fore-mentioned reasons dealing with Res Judicata as being inapplicable, the fact that the Appellant was denied the right of a hearing "on the merits" in the state court proceedings has rendered Res Judicata inapplicable as to all Defendants. The merits of the servicing issues and violations of regulations were never addressed as they could not be raised as a counter claim because counter claims are not permitted in Pennsylvania foreclosure actions. As a defense to foreclosure the issues of improper servicing and violation of regulations were rejected as being inapplicable by the state court and removed from

consideration. The Superior Court concluded that: "The trial court correctly held that the equitable defense of failure to properly service a federally insured mortgage was not available to the appellants [Fry]". (Ap.I 28) See **BRIEF OF APPELLANT**: pages 8, 35-38, **REPLY BRIEF OF APPELLANT AS TO BRIEF OF FEDERAL APPELLEE**: pages 20-21, **REPLY BRIEF OF APPELLANT AS TO BRIEF OF APPELLEES FIRST INVESTMENT AND ALLIANCE MORTGAGE**: pages 16-18.

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STATE JUDGMENTS - FEDERAL COURTS, 72 L.Ed 2d 911, 921: * Note: Although it was not necessary for the Supreme Court to rule on whether the state court procedures in question were sufficient, the court did state in Montana v. United States (1979) 440 US 147, 59 L.Ed 2d 210, 99 S.Ct 970, and Allen v. McCurry (1980) 449 US 90, 66 L.Ed 2d 308, 101 S.Ct 411, that the concept of collateral estoppel cannot apply in a subsequent federal action when the party against whom the earlier decision is asserted did not have a full and fair opportunity to litigate the issue in question in the earlier case."

Donegal Steel Foundry Co. v Accurate Products Co. 516 F.2d 583, 588 (3rd Cir. 1975): "The conclusive effect of prior adjudication constitutes an estoppel only with respect to issues actually litigated and necessary to support the initial judgment. Litigation of any matter that was "collaterally in question", "incidently cognizable" or "to be inferred by argument from the judgment" is not restricted in a subsequent suit."

Adams v. Pennsylvania National Ins. Co. 21 Lye. 73, 77-78 (2000): "Collateral Estoppel/Res

> Judicata ... (4) the party against whom the plea is asserted has had the full and fair opportunity to litigate the issue in question in a prior action. ... doctrine of res judicata applies when the cause of action in one proceeding is identical to that involved in a prior judgment. ... is not "identical" to either theory. Therefore, ... complaint is not barred by the doctrine of Res Judicata."

Also, Appellant was abandoned by counsel in the state proceedings.

> Greenleaf v. Garlock, 174 F.3d 352 (1999): Quoting Dyndul v. Dyndul, 620 F.2d 409, 412 "We determined that issue preclusion was justified observing that (i) the party against whom issue preclusion was asserted was represented by counsel in the prior state action, ..."

Appellant had been represented by counsel in the Court of Common Pleas as well as in the preparation and filing of a proper appeal to the Pennsylvania Superior Court. However, Appellant's case was heard without the benefit of representation at Oral Argument. This was unknown to the Appellant until after receiving a copy of the Superior Court's Opinion. Appellant's counsel had

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suffered multiple cardiac arrests, had been hospitalized out-of-state and ultimately had received a heart transplant. Appellant's counsel had effectively abandoned the Appellant and left the Appellant entirely and unknowingly unrepresented throughout the remainder of the Superior Court's activities. As Appellant could not acquire another counsel following the conclusion of the Superior Court activities, Appellant

proceeded Pro Se to file a "PETITION FOR EXTRAORDINARY RELIEF BASED UPON MEDICALLY INCAPACITATED COUNSEL OF RECORD" in the Superior Court requesting reargument and, upon denial, then appealed to the Pennsylvania Supreme Court, which was ultimately dismissed per curiam. As the Appellant had been abandoned by Counsel and was unrepresented before the Superior Court, the merits of the Appellant's argument and defenses were never heard. **REPLY BRIEF OF APPELLANT AS TO BRIEF OF APPELLEES FIRST INVESTMENT AND ALLIANCE MORTGAGE**: pages 17, See Appendix: Ap.I 109-111. See WILLIAMS V. TAYLOR, 120 S.Ct. 1495 (2000), SMITH V. ROBBINS, 120 S.Ct 746 (2000), EDWARDS V. CARPENTER, 120 S.Ct 1587 (2000).

> WERTS V. VAUGHN, 2000 U.S.App.LEXIS 23553, (3rd Cir 2000, 98-1764): "... Thus, the court concluded that when deciding an ineffectiveness claim, the reasonableness of counsel's conduct must be judged in light of the facts of the particular case at the time the conduct occurred."
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> ROE V. FLORES-ORTEGA, 120 S.Ct. 1029 (2000): "The complete denial of counsel during a critical stage of a judicial proceeding, however, mandates a presumption of prejudice because "the adversary process itself" has been rendered "presumptively unreliable." (quoting United States v. Cronic, 466 U.S. 648, 659, 80 L.Ed. 2d 657, 104 S.Ct. 2039)

Counsel of Record in state proceedings having multiple cardiac arrests and then a heart transplant does not excuse dereliction of

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responsibility and abandonment of Appellant. At the

least it was "ineffective counsel" and prejudiced the Oral Argument at which he did not appear as well as all following proceedings, including "the right to timely file an appeal." (as per ROE V. FLORES-ORTEGA).

CONCLUSION

The Appellant respectfully requests that this petition for rehearing and/or in banc review be granted as the issues presented herein are unique to this Circuit.

Under these circumstances, and for the reasons set forth above, the petition for rehearing in banc or by the panel should be granted and the matter should be remanded to the District Court in its entirety or, in the alternative, to remand for the purpose of allowing the Appellant the right of limited discovery.

Respectfully submitted by William L. Fry, Pro Se., the Appellant/Plaintiff in this matter.

s/ William L. Fry
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